(12)

No. 05-1448
Title: Jeffrey H. Beck, Liquidating Trustee of the Estates of Crown Vantage, Inc. and Crown Paper Company, Petitioner
v.
PACE International Union, et al.
Docketed: May 12, 2006
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (03-15303, 03-15331)
Decision Date: October 24, 2005
Rehearing Denied: January 10, 2006
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Feb 17 2006	Application (05A769) to extend the time to file a petition for a writ of certiorari from April 10, 2006 to May 10, 2006, submitted to Justice Kennedy.
Feb 21 2006	Application (05A769) granted by Justice Kennedy extending the time to file until May 10, 2006.
May 10 2006	Petition for a writ of certiorari filed. (Response due June 12, 2006)
Jun 12 2006	Brief of respondents PACE International Union, et al. in opposition filed.
Jun 28 2006	DISTRIBUTED for Conference of September 25, 2006.
Aug 8 2006	Reply of petitioner Jeffrey H. Beck, Liquidating Trustee filed. (Distributed).
Oct 2 2006	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Dec 22 2006	Brief amicus curiae of United States filed.
Jan 3 2007	DISTRIBUTED for Conference of January 19, 2007.
Jan 17 2007	Supplemental brief of respondents PACE International Union, et al. filed. (Distributed)
Jan 19 2007	Petition GRANTED.
Feb 5 2007	SET FOR ARGUMENT ON Tuesday, April 24, 2007.
Feb 14 2007	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Feb 27 2007	Joint appendix filed.
Mar 2 2007	Brief of petitioner Jeffrey H. Beck, Liquidating Trustee filed.
Mar 5 2007	Brief amicus curiae of United States filed.
Mar 5 2007	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Mar 7 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 8 2007	CIRCULATED.
Mar 12 2007	Record received from U.S.D.C. for Northern District of California. (1 box)
Apr 6 2007	Brief of respondents PACE International Union, et al. filed. (Distributed)
Apr 13 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 17 2007	Reply of petitioner Jeffrey H. Beck, Liquidating Trustee filed. (Distributed)
Apr 20 2007	Letter from the Solicitor General received and distributed.
Apr 24 2007	Argued. For petitioner: M. Miller Baker, Washington, D.C.; and Matthew D. Roberts, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United

States, as amicus curiae.) For respondents: Julia P. Clark, Washington, D.

(1)

Supreme Court, U.S.
FILED

No. 05- 051448 MAY 10 2006

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JEFFREY H. BECK,
Liquidating Trustee of the Estates of
Crown Vantage, Inc. and Crown Paper Company,

Petitioner,

v.

PACE INTERNATIONAL UNION,
EDWARD J. MILLER, and JEFFREY D. MACEK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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May 10, 2006

QUESTION PRESENTED

Whether a pension plan sponsor's decision to terminate a plan by purchasing an annuity, rather than to merge the pension plan with another, is a plan sponsor decision not subject to ERISA's fiduciary obligations.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to this proceeding in the United States Court of Appeals for the Ninth Circuit are the same as the parties to this proceeding: Petitioner Jeffrey H. Beck, Liquidating Trustee of the Estates of Crown Paper Company and Crown Vantage, Inc., and Respondents PACE International Union, Edward J. Miller, and Jeffrey D. Macek.

Corporate Disclosure Statement: Petitioner is the trustee in bankruptcy of Crown Paper Company and Crown Vantage, Inc. Crown Paper Company was a wholly-owned subsidiary of Crown Vantage, Inc., which itself had no corporate parent. No publicly-traded entity owned ten percent or more of Crown Vantage, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Jeffrey H. Beck, Liquidating Trustee for the Estates of Crown Vantage, Inc. and Crown Paper Company, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decisions of the court of appeals are available at *Beck v. PACE International Union*, 427 F.3d 668 (9th Cir. 2005) (reported), and *Beck v. PACE International Union*, 146 Fed. Appx. 917 (9th Cir. 2005) (unreported), and are reprinted at App. 1–24 and App. 25–28, respectively. The order of the court of appeals denying rehearing and rehearing en banc is reprinted at App. 84–85.

The court of appeals affirmed in part and vacated in part the decision of the United States District Court for the Northern District of California, which is unpublished but available at *Beck v. PACE International Union*, 2003 U.S. Dist. LEXIS 2283 (N.D. Cal. Jan. 10, 2003), and reprinted at App. 29–50.

The district court affirmed the preliminary injunction order entered by the United States Bankruptcy Court for the Northern District of California on February 5, 2002, reprinted at App. 74–76. This order incorporated by reference oral findings of fact and law made on December 11, 2001, and reprinted at App. 51–73. By a stipulation of the

parties approved by the bankruptcy court, the preliminary injunction order was deemed a final judgment on the merits. App. 78, 83.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Ninth Circuit entered its judgment and opinions on October 24, 2005, and denied Petitioner's timely petition for rehearing and rehearing en banc on January 10, 2006. Petitioner's application to extend the time to file a petition for writ of certiorari until May 10, 2006, was granted by Justice Kennedy on February 21, 2006. Supreme Court Docket No. 05A769. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

29 U.S.C. § 1341(a), "General rules governing single-employer plan terminations," provides:

> (1) Exclusive means of plan termination.
>
> Except in the case of a termination for which proceedings are otherwise instituted by the corporation as provided in section 1342 of this title, a single-employer plan may be terminated only in a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section.

(2) 60-Day notice of intent to terminate.

Not less than 60 days before the proposed termination date of a standard termination under subsection (b) or a distress termination under subsection (c), the plan administrator shall provide to each affected party (other than the corporation in the case of a standard termination) a written notice of intent to terminate stating that such termination is intended and the proposed termination date. The written notice shall include any related additional information required in regulations of the corporation.

29 U.S.C. § 1341(b), "Standard termination of single-employer plans," provides:

(1) General requirements.

A single-employer plan may terminate under a standard termination only if . . .

(D) when the final distribution of assets occurs, the plan is sufficient for benefit liabilities (determined as of the termination date) . . . .

(3) Methods of final distribution of assets.

(A) In general.

In connection with any final distribution of assets pursuant to the standard termination of the plan under this subsection, the plan ad-

> ministrator shall distribute the assets in accordance with section 1344 of this title. In distributing such assets, the plan administrator shall—
>
> > (i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or
> >
> > (ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan. A transfer of assets to the corporation in accordance with section 1350 of this title on behalf of a missing participant shall satisfy this subparagraph with respect to such participant.

29 U.S.C. § 1344, "Allocation of assets," provides:

> (a) Order of priority of participants and beneficiaries
>
> In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan . . . .

(d) Distribution of residual assets; restrictions on reversions pursuant to recently amended plans; assets attributable to employee contributions; calculation of remaining assets

(1) Subject to paragraph (3), any residual assets of a single-employer plan may be distributed to the employer if—

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

29 U.S.C. § 1412, "Transfers between a multiemployer plan and a single-employer plan," provides:

(a) General authority

A transfer of assets or liabilities between, or a merger of, a multiemployer plan and a single-employer plan shall satisfy the requirements of this section.

29 C.F.R. § 4041.28(c)(1) provides:

> *In general.* The plan administrator must, in accordance with all applicable requirements under the Code and ERISA, distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer or in another permitted form.

STATEMENT OF THE CASE

Petitioner Jeffrey H. Beck serves as the liquidating trustee for Crown Vantage, Inc. and Crown Paper Company (collectively, "Crown"). Crown formerly operated a series of paper mills, through which it employed approximately 2600 workers, many of whom were represented by the PACE International Union (PACE) through collective bargaining agreements. App. 4, 55. In March 2000, Crown filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Northern District of California. App. 4.

Members of Crown's board of directors served as trustees for the twelve employee pension plans at issue in this case. App. 4. In the bankruptcy, the Pension Benefit Guaranty Corporation (PBGC) filed proofs of claims totaling millions of dollars for the liability it would be forced to assume if it took over Crown's pension plans. The bankruptcy court viewed the continued existence of Crown's pension plans as a "stumbling block" to plan confirmation. *Id.*

To advance the confirmation of a Chapter 11 plan, Crown investigated the possibility of effecting a "standard termination" of the plans under 29 U.S.C. § 1341(b) in July of 2001. App. 4. Specifically, Crown explored termination through purchase of an annuity for plan participants. *Id.*

While Crown investigated terminating the plans, PACE proposed that Crown merge the plans into the PACE Industrial Union Management Pension Fund (PIUMPF). App. 5.

In October 2001, Crown's board met to review a series of final annuity bids. Based on a variety of advantages provided by termination through annuitization, including but not limited to the financial security of the annuity, Crown's board approved and immediately consummated the purchase of an $84 million annuity from Hartford Life Insurance Company. App. 6–7. In opting to terminate the plans by purchase of the Hartford annuity, the Crown board did not accept PACE's alternative merger proposal. *Id.*

In November 2001, respondent PACE, along with respondents and plan members Miller and Macek, filed this adversary action in the Northern District of California, which was referred to that district's bankruptcy court wherein the Crown bankruptcy proceeding was pending. Respondents alleged that Crown had breached its fiduciary duties to plan participants under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, by failing adequately to consider PACE's merger's proposal before purchasing the Hartford

annuity. Respondents sought, *inter alia*, preliminary and permanent injunctive relief restraining Crown from distributing the $5 million plan surplus to Crown creditors and voiding the Hartford annuity purchase. App. 7.

In a telephonic hearing on Respondents' application for a preliminary injunction, the bankruptcy court ruled from the bench that although termination of pension plans is a business decision not subject to ERISA fiduciary duties, discretionary actions taken to *implement* that decision carry a fiduciary responsibility. App. 65–66. The bankruptcy court then concluded that merger into an ongoing plan is a method of terminating pension plans and therefore any decision concerning merger was subject to ERISA's fiduciary obligations. App. 66 As Crown did not make an "intensive and scrupulous investigation" of the possible merger, App. 65, the bankruptcy court ruled that Crown violated its fiduciary duties to the plan participants. App. 66–67.

On that basis, the bankruptcy court partially granted PACE's application for a preliminary injunction. The bankruptcy court declined to void the Hartford annuity purchase, but did order the plan surplus proceeds (the "reversion") frozen pending a final decision on disposition of the reversion. App. 67. The bankruptcy court later issued a written order incorporating by reference its oral preliminary injunction order. *See* App. 74–76. By a stipulation of the parties approved by the bankruptcy court, the court's preliminary injunction order was deemed a final ruling on the merits, in

accordance with FED. R. CIV. P. 65(a)(2) and FED. R. BANKR. P. 7065. App. 78, 83. By the same stipulation approved by the bankruptcy court, the parties agreed to a mechanism for distribution of the reversion to plan participants. App. 79–81. The distribution of the reversion has been suspended during the pendency of the ensuing appeals.

Crown appealed to the district court, arguing, *inter alia*, that its refusal to fully consider PACE's merger proposal was a plan sponsor decision not subject to ERISA's fiduciary obligations. The district court affirmed the bankruptcy court, holding that a plan termination could be effectuated by merger under 29 U.S.C. § 1341(b)(3), and that merger (as a means of implementing a decision to terminate) was subject to ERISA fiduciary obligations. App. 46–47.

Crown appealed the district court decision to the Ninth Circuit, which began its analysis by observing that a decision to terminate a pension plan is a business decision not subject to ERISA's fiduciary obligations, whereas the implementation of such a decision to terminate is subject to ERISA's fiduciary obligations. App. 9 (citing *Waller v. Blue Cross of Cal.*, 32 F.3d 1337, 1342–44 (9th Cir. 1994)). Thus, in the Ninth Circuit's view, whether Crown had any fiduciary obligations with respect to considering Crown's proposed merger turned on "whether merger into a multiemployer plan is a permissible means of implementing a decision to terminate." App. 9. Crown argued that merger is not a permissible means of termination, and that in any event, a plan sponsor decision regarding merger is not subject to ERISA fiduciary duties.

The court of appeals held, based on 29 U.S.C. § 1341(b)(3)(A) and 29 C.F.R. § 4021.28(c)(1), that merger is a form of termination permitted by ERISA. App. 11–15. The relevant statutory language relied upon by the Ninth Circuit provides that in terminating a plan, a plan administrator may distribute plan assets by purchasing "'irrevocable commitments from an insurer to provide all benefit liabilities under the plan, *or . . . otherwise fully provide all benefit liabilities under the plan.*'" App. 11–12 (quoting 29 U.S.C. § 1341(b)(3)(A) (i), (ii); emphasis by the court). The regulation cited by the Ninth Circuit provides: "'The plan administrator must . . . distribute plan assets . . . by purchase of an irrevocable commitment from an insurer *or in another permitted form.*'" App. 12 (quoting 29 C.F.R. § 4021.28(c)(1); emphasis by the court). Based on this language, the Ninth Circuit held that "neither the statute nor its implementing regulations preclude mergers into multiemployer plans as a method of providing such benefit liabilities." App. 15.

In response to Crown's argument that ERISA treats terminations and mergers through wholly separate sections of the statute, the Ninth Circuit noted that both sections in question are placed in the same ERISA subchapter, "Plan Termination Insurance." According to the Ninth Circuit, "[i]t would have been logical for Congress to" lodge both statutes in the same subchapter, because "one practical effect of a merger or complete transfer is that at least one pension plan will cease to exist." App. 13.

As noted above, the premise of the Ninth Circuit's decision was that a plan sponsor's *implementation* of a termination is subject to fiduciary duties, even if the decision to terminate itself is not subject to such duties. Given the court's finding that merger into an ongoing plan is a "means of termination," App. 16, it necessarily followed that Crown's rejection of PACE's merger proposal was subject to ERISA's fiduciary obligations. The Ninth Circuit concluded that that Crown had violated those fiduciary duties by focusing on "an improper set of interests" in rejecting PACE's merger proposal. App. 20.

Crown, supported by the Department of Labor and the PBGC as separate *amici curiae*,[1] petitioned the Ninth Circuit for panel rehearing or rehearing en banc. In its submission, the PBGC noted that "[t]he [panel] decision represents an unprecedented interpretation of [ERISA] Title IV that will frustrate PBGC's administration of the termination insurance program and put participants' pension benefits at risk." PBGC Amicus Curiae Br. at 2.

The court of appeals denied the petition on January 10, 2006.

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[1] The PBGC is a federal corporation established by ERISA with the authority to appear in court represented by its own counsel. *See* 29 U.S.C. § 1302. Thus, the PBGC's amicus submission in support of Petitioner was separate from the submission of the Department of Labor.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Decision That a Plan Merger Decision Is Subject to ERISA Fiduciary Duties Conflicts with Decisions of the Third and Sixth Circuits and This Court

The Ninth Circuit's decision in this case that Crown was subject to ERISA fiduciary duties when it rejected PACE's merger proposal squarely conflicts with decisions of the Third Circuit and Sixth Circuit holding that decisions concerning the merger of pension plans are *not* subject to ERISA's fiduciary obligations. *See Malia v. Gen. Elec. Co.*, 23 F.3d 828, 833 (3d Cir. 1994) ("Efforts by an employer to merge two pension plans do not invoke the fiduciary duty provisions of ERISA. Such duties do not attach to business decisions related to modification of the design of a pension plan."); *Sutter v. BASF Corp.*, 964 F.2d 556, 562 (6th Cir. 1992) ("BASF's decision to merge the two plans . . . clearly constituted the establishment or amendment of a pension plan and is therefore a business decision that should not be overturned by the court in the absence of violation of state or federal law.").

The Third Circuit's holding in *Malia* and the Sixth Circuit's holding in *Sutter* represent applications of the rationale of a series of this Court's ERISA decisions. In these decisions, this Court has held that the modification, amendment, or termination of an ERISA plan is a business decision not subject to ERISA's fiduciary obligations. *Hughes*

Aircraft Co. v. Jacobson, 525 U.S. 432, 444 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). This rule stems from ERISA's definition of fiduciary.[2] *See Lockheed*, 517 U.S. at 890 ("Because the defined functions in the definition of fiduciary do not include plan design, an employer may decide to amend an employee benefit plan without being subject to fiduciary review.") (citation and brackets omitted).

A decision to merge (or not merge) a pension plan implicates the same concerns as those involving the modification, amendment, or termination of plan: plan structure, entitlement to benefits, and amount of benefits. *See Hughes*, 525 U.S. at 444 ("In general, an employer's decision to amend a pension plan *concerns the composition or design of the plan itself* and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets.") (emphasis added). Thus, the Ninth Circuit's decision in this case conflicts with the rationale of this Court's decisions in *Hughes*, *Lockheed*, and *Curtiss-Wright*, because a merger implicates the composition or design of a plan just as much as a termination, amendment, or modification.

---

[2] ERISA defines a "fiduciary" as a person who possesses "discretionary authority or . . . control respecting management of [a pension plan or] . . . discretionary authority or . . . responsibility in the administration of [a pension plan]." 29 U.S.C. § 1002(21)(A).

II. The Ninth Circuit Decision Conflicts with the Administering Agencies' Interpretations of ERISA, Which Are Entitled to Deference

Courts "owe great deference to the interpretations and regulations of the [PBGC] . . . and the Department of Labor, which are the administrative agencies responsible for enforcing and interpreting ERISA." *Blessitt v. Ret. Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1167 (11th Cir. 1988). As noted above, both the Labor Department and the PBGC urged the en banc Ninth Circuit to vacate the panel opinion and reverse the district court decision. The Labor Department argued that under this Court's decisions, a plan sponsor's decision regarding merger, as a decision regarding the structure of the plan, is not subject to ERISA fiduciary obligations. The PBGC argued that under ERISA, termination may not be implemented by merger. The views of these agencies are entitled to deference.

Moreover, the Ninth Circuit's holding conflicts with various PBGC regulations, all of which make clear that merger is not a permitted means of termination. For example, 29 C.F.R. § 4041.23(b)(9) requires that a plan sponsor notify plan participants that termination will end the PBGC's guarantee of their plan benefits. However, under the Ninth Circuit's decision, merger (as the implementation of termination) will not end the PBGC's guarantee because the plan assets are transferred to the new plan, where the guarantee continues.

III. The Ninth Circuit Destabilizes ERISA Law in the Ninth Circuit

The ramifications of the Ninth Circuit decision are not limited to the parties in this case. The Ninth Circuit decision destabilizes ERISA law in a way that impacts the rights of all ERISA plan participants in that circuit, as well as the planning and administration of all ERISA-regulated entities in that circuit. In addition, the Ninth Circuit decision jeopardizes the interests of the PBGC, the federal agency with primary responsibility for regulating ERISA plans.

A. The Ninth Circuit Decision Puts the Benefits of Plan Participants at Risk

As discussed below, ERISA requires that in a standard termination, plan participants receive their full benefits, either directly by a cash payment, or indirectly through the purchase of annuity that itself guarantees full payment of plan benefits. In any event, whatever the means of the distribution of plan assets in standard termination, ERISA requires that the distribution provide full plan benefits. As discussed below, however, a merger simply does not guarantee that plan participants will receive their full plan benefits.

B. The Ninth Circuit Decision Thwarts ERISA's Objective of Encouraging Employers to Adequately Fund Pension Plans

As discussed below, *infra* Part IV.A, ERISA provides that upon distribution of all benefit liabilities in a standard termination, a plan sponsor can choose to retain any surplus assets in the plan. *See* 29 U.S.C. § 1344(d). By reducing or eliminating plan sponsors' entitlement to the residual assets of overfunded pension plans, the Ninth Circuit decision discourages plan sponsors from adequately funding their pension plans. *See Hawkeye Nat'l Life Ins. Co. v. Avis*, 122 F.3d 490, 502 n.7 (8th Cir. 1997) (depriving employers of residual plan assets could encourage employers to underfund plans); *Chait v. Bernstein*, 835 F.2d 1017, 1027 (3d Cir. 1988) (same). This result is inconsistent with ERISA's policy of encouraging adequate employer funding of pension plans and is manifestly contrary to the public interest.

C. The Ninth Circuit Decision Jeopardizes the PGBC's Interest in Obtaining Insurance Premiums from Plan Sponsors

The Ninth Circuit decision jeopardizes the PGBC's interest in obtaining insurance premiums from plan sponsors for funding the PGBC's statutory obligations. In its amicus submission in the Ninth Circuit, the PGBC explained:

> By holding that a termination can be accomplished by merger, the [panel] has also

> created a basis for the failure to pay insurance premiums in mergers of the kind involved here. Because mergers combine rather than satisfy benefit liabilities, a plan sponsor's obligation to pay statutory premiums under 29 U.S.C. § 1307 continues. Terminations, however, halt the accrual of premiums; if termination can be accomplished by merger, sponsors may seek to merge to avoid their premium obligations.

PGBC Amicus Curiae Br. at 14–15.

IV. The Ninth Circuit Decision That a Plan Merger Decision Is Subject to ERISA Fiduciary Duties Is Erroneous

A. ERISA Does Not Permit Termination by Merger Because Termination and Merger Are Mutually Exclusive

The crux of the Ninth Circuit's decision is its conclusion that ERISA permits termination of a single-employer pension plan by merger into a multi-employer pension plan. This conclusion is erroneous as a matter of law because termination and merger are mutually exclusive under ERISA. *See Franklin v. First Union Corp.*, 84 F. Supp. 2d 720, 729 (E.D. Va. 2000) ("The law distinguishes between a merger of a plan and a termination of a plan."). In short, termination results in a distribution of plan assets *outside* of the ERISA-regulated regime, whereas merger merely shifts assets from one ERISA-regulated plan to another.

ERISA provides for (i) terminations of single-employer pension plans, on the one hand, and (ii) mergers of such plans, on the other hand, in two wholly separate sections of the statute, *i.e.*, 28 U.S.C. § 1341 (contained in "Subtitle C—Terminations") and 28 U.S.C. § 1412 (contained in "Subtitle E—Part 2 Merger or Transfer of Plan Assets or Liabilities"). Neither section authorizes a plan administrator to implement the termination of a single-employer pension plan through a merger.

On the contrary, the "exclusive" mechanism for terminating a single-employer pension plan is set forth in Section 1341. *See* 29 U.S.C. § 1341(a)(1) ("Exclusive Means of Plan Termination"). Section 1341 provides that "a single-employer plan may be terminated *only*" under Section 1342 (involuntary termination of financially troubled plans), Section 1341(b) (standard termination), or Section 1341(c) (distress termination). *Id.* (empasis added). Subsections (b) and (c) of Section 1341 "concern the two ways by which an employer may voluntarily terminate a plan," *Hughes*, 525 U.S. at 446, and "these means constitute the *sole* avenues for voluntary termination." *Id.* (emphasis added). Section 1341's "exclusive" termination procedures do not reference the term "merger," nor do they identify merger as one of the "exclusive" ways to terminate a plan.

An entirely different ERISA provision, Section 1412, governs the merger of a single-employer plan, like the Crown plans at issue here, into a multiemployer plan, like PIUMPF. *See* 29 U.S.C. § 1412. Section 1412 is the only ERISA section that

authorizes such a merger, and it does not provide that a merger is a form of termination. Indeed, under the *expressio unius* canon of construction, Section 1412(a) implies that no other section of ERISA applies to mergers: "A transfer of assets or liabilities between, or merger of, a multiemployer plan and a single-employer plan *shall satisfy the requirements of this section*." 29 U.S.C. § 1412(a) (emphasis added).

Under the Ninth Circuit's decision, the separate statutory provisions governing merger and termination would *both* apply when merger is used as a means of termination. That is impossible, however, because termination under Section 1341 and merger under Section 1412 are subject to conflicting requirements and produce different results.

First, and most pertinent to this case, termination under Section 1341 *allows* for reversion of surplus plan funds to a plan sponsor upon termination because in termination, the plan's liabilities are fully satisfied. *See* 29 U.S.C. § 1344(d); *Bigger v. Am. Commercial Lines, Inc.*, 862 F.2d 1341, 1345 (8th Cir. 1988) ("Under section 1344, a plan sponsor may recapture all surplus assets after a termination of a plan if certain criteria are satisfied"). Merger, on the other hand, does not permit any reversion of funds to the employer, because in a merger *all* assets of the merged funds are transferred to the acquiring fund for future satisfaction of benefit liabilities. *See* 26 C.F.R § 1.414(l)-1(b)(2). Thus, merger, which *precludes* reversion of surplus funds, cannot be a means of termination, which *allows* reversion.

Second, a standard termination of a single-employer plan under ERISA requires a distribution that *guarantees* to provide "all benefit liabilities" under the plan. ERISA Section 1341(b)(3)(A) provides that in "any final distribution of plan assets" in a standard termination, the plan administrator shall "purchase irrevocable commitments from an insurer to provide *all benefit liabilities* under the plan" or "*otherwise fully provide all benefit liabilities* under the plan." 29 U.S.C. § 1341(b)(ii) (emphasis added).

Prior to the Ninth Circuit's decision in this case, the only recognized methods of satisfying Section 1341(b)(3) were (i) to pay each plan participant in full, *see* 29 C.F.R. §§ 4041.28(c)(2), (4) (if a plan permits, benefits may be distributed in the form of a one-time lump sum payment under Section 1341(b)(3)(A)(ii)), or (ii) to purchase an annuity guaranteed to pay each plan participant in full, *see* 29 U.S.C. § 1341(b)(1)(D) (permitting employers to implement a standard termination by purchasing "irrevocable commitments from an insurer to provide all benefit liabilities").

Merger of a single-employer plan into a multi-employer plan, however, carries no guarantee of immediate or future payment of *full* plan benefit liabilities. A multiemployer plan could never satisfy Section 1341(b)'s guarantee of full payment of pension benefits because, following a merger, ERISA does not provide full protection for the benefits owed to the participants of a former overfunded single-employer plan. Instead, participants of a single-employer plan must rely on the continuing solvency

of the multiemployer plan, which is by no means assured in fact or in law. Once assets of a single-employer plan have been transferred to a multiemployer plan, those assets are available to satisfy the benefit liabilities of *all* participants in the multiemployer plan, not merely the participants in the former plan. Precisely because merger (unlike termination) does not *guarantee* a plan participant's full benefits, the Ninth Circuit erred in holding that Section 1341(b)(3) allows for merger as a means of termination.[3]

Third, under a standard termination, the plan sponsor is required to distribute plan assets in accordance with Section 1344. *See* 29 U.S.C. § 1341(b)(3). Under Section 1344, "in the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan . . . *among the participants and beneficiaries of the plan.*" 29 U.S.C. § 1344(a) (emphasis added). In a merger, however, the plan's assets are not distributed to plan

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[3] If the multiemployer plan becomes insolvent and is subsequently terminated, the consequences to the plan participants of the former single-employer plan are disastrous. First, under Section 1441, the sponsors of the multiemployer plan would be required to reduce the benefits to which the participants of the single-employer plan formerly were entitled. *See* 29 U.S.C. § 1441. Second, only approximately $13,000 of those reduced annual benefits would be guaranteed by the PBGC and any additional amount owed to a participant could be recovered, if at all, only from the insolvent multiemployer plan. *See* 29 U.S.C. § 1322(a). The participants in the formerly fully funded single-employer pension plan simply would not receive their full retirement benefits.

participants and their beneficiaries; instead, the assets are transferred to the acquiring multiemployer plan, where the assets would be available to pay *all* benefits of *all* participants in the multiemployer plan.

Fourth, because a standard termination fully satisfies benefit liabilities to plan participants, termination extinguishes the PBGC's obligation to guarantee certain minimum benefits under a terminating plan. *PBGC v. LTV Corp.*, 496 U.S. 633, 639 (1990). In a merger, however, a participant's accrued benefit is not satisfied, and the merger does not extinguish the PBGC's guarantee.

Fifth, a termination of a single-employer plan ends a plan sponsor's obligation to pay insurance premiums to the PBGC, precisely because the liabilities to plan members are satisfied by the termination's distribution. *See* 29 U.S.C. § 1307(a); 57 Fed. Reg. 22168 (May 27, 1992). Merger, however, does *not* end a plan sponsor's obligation to pay insurance premiums to the PBGC. *See* 29 U.S.C. § 1307(e)(1). If merger is a valid means of termination, as the Ninth Circuit decision holds, then the obligation to pay premiums would seemingly be ended. Such a result would leave the PBGC to insure unpaid plan benefits, without any payment of insurance premiums.

Sixth, in a termination, the plan administrator must comply with stringent notice requirements to participants in advance of the distribution of plan proceeds. *See* 29 U.S.C. § 1341(a)(2). The required notice must inform participants that upon distribu-

tion, the PBGC's guarantee is extinguished. 29 C.F.R. § 4041.23. In a merger, however, participants receive notice after the fact, 29 C.F.R. § 2525.104-4, and as noted above, the PBGC's guarantee continues.

In sum, termination and merger are different in kind under ERISA. The two procedures are governed by different statutes, subject to different requirements, and produce different results: termination results in the end of an ERISA-regulated plan, while merger results in continuance of the plan (in a different form) under the ERISA regime. The Ninth Circuit's holding that termination can be effected by merger is simply wrong.

B. In Any Event, Merger Is a Plan Sponsor Decision Not Subject to Fiduciary Duties

The Ninth Circuit's decision is wrong for a second and independent reason. Under ERISA, fiduciary duties only attach to the exercise of "discretionary authority or . . . control respecting management of [a pension plan or] . . . discretionary authority or . . . responsibility in the administration of [a pension plan]." 29 U.S.C. § 1002(21)(A). As discussed above in Part I, *supra*, this Court's decisions teach that a plan sponsor's decisions regarding plan design or structure are not subject to fiduciary obligations. *See Lockheed*, 517 U.S. at 890. As merger involves a decision regarding plan structure or design, it simply cannot be subject to fiduciary review.

CONCLUSION

For the reasons provided above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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May 10, 2006

APPENDIX

App. 1

JEFFREY H. BECK,
LIQUIDATING TRUSTEE OF THE ESTATES OF
CROWN VANTAGE, INC. AND CROWN PAPER COMPANY,
Appellant,

v.

PACE INTERNATIONAL UNION,
ON BEHALF OF MEMBER AND FORMER MEMBER
PARTICIPANTS IN PENSION PLANS SPONSORED BY THE
DEBTORS;

EDWARD MILLER; JEFFREY D. MACEK,
ON BEHALF OF THEMSELVES
AND OTHERS SIMILARLY SITUATED,
Defendants-Appellees.

PACE INTERNATIONAL UNION, AFL-CIO,
CHEMICAL & ENERGY WORKERS INTERNATIONAL
UNION, ON BEHALF OF MEMBERS AND FORMER
MEMBER PARTICIPANTS IN PENSION PLANS,
Defendant-Appellant,

v.

JEFFREY H. BECK,
LIQUIDATING TRUSTEE OF THE ESTATES OF
CROWN VANTAGE, INC. AND CROWN PAPER COMPANY,
Appellee.

No. 03-15303, No. 03-15331

App. 2

United States Court of Appeals
for the Ninth Circuit

427 F.3d 668

November 4, 2004, Argued and Submitted
October 24, 2005, Filed

Stephen A. Kroft (argued), Rodger M. Landau, Los Angeles, California, for the appellant/cross-appellee.

John Plotz (argued), Christian L. Raisner, Oakland, California, for the appellees/cross-appellant.

Before: Stephen Reinhardt, Richard A. Paez, and Marsha S. Berzon, Circuit Judges. Opinion by Judge Paez.

PAEZ, Circuit Judge:

In the course of Chapter 11 liquidation proceedings, debtors Crown Vantage, Inc. and Crown Paper Co. (Crown) decided to terminate Crown's pension plans through the purchase of an annuity, rather than by merging the plans into a multiemployer plan sponsored by PACE International Union (PACE). Plan participants and PACE filed an adversary action against Crown in bankruptcy court, alleging that Crown's directors breached their fiduciary duties under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. §§ 1001–1461, by failing to consider adequately the proposed merger. The bankruptcy court agreed and issued a preliminary injunction ordering that Crown maintain the

residual assets -- approximately $ 5 million -- in the plan in an interest-bearing account pending a final decision on the allocation of the assets. Pursuant to the bankruptcy court's order, the parties submitted a joint plan for the distribution of the residual assets for the benefit of the plan participants and stipulated that the court's ruling on the preliminary injunction could be treated as a final ruling on the merits under Federal Rule of Civil Procedure 65(a)(2). The bankruptcy court approved the plan.

As in the bankruptcy and district courts, Crown[1] argues that it did not breach its fiduciary duties to plan participants and beneficiaries because merger into a multiemployer plan is an impermissible means of terminating a pension plan under ERISA, its implementing regulations, and the terms of the pension plan. PACE cross-appeals the district court's determination that it lacked standing to pursue an appeal.

We have jurisdiction pursuant to 28 U.S.C. § 158(d). We hold that under ERISA and its regulations, merger into a multiemployer plan is not a prohibited means of terminating a pension plan, and that the bankruptcy court did not err in concluding that Crown breached its fiduciary duties by failing to consider thoroughly PACE's proposal

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[1] Appellant Jeffrey H. Beck is the liquidating trustee of the Crown estates. Because the actions of Crown's board of directors, the trustees of the pension plans, are the focus of this action, however, we refer to Crown as the appellant.

and discharge its duties "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). With respect to PACE's cross-appeal, we vacate the district court's judgment on that issue with directions to remand to the bankruptcy court for further proceedings.[2]

I. Facts and Procedural History

Crown Vantage, Inc. was the parent company of Crown Paper Co., which operated seven paper mills in the Eastern United States and employed 2600 workers. The employees were covered by collective bargaining agreements with PACE. Members of Crown's board of directors were also the trustees for its eighteen pension plans.

In March of 2000, Crown filed for Chapter 11 bankruptcy and began liquidating its assets. *See generally In re Crown Vantage, Inc.*, 421 F.3d 963, 967–68 (9th Cir. 2005). The Pension Benefit Guarantee Corporation (PBGC) filed proofs of claims totaling millions of dollars for the liability it would have been forced to assume if it had taken over Crown's pension plans. The bankruptcy court viewed PBGC's proofs of claims as a "stumbling block" to Chapter 11 plan confirmation. In July of 2001, Crown's board began to obtain quotes for the purchase of an annuity as a means of effecting a "standard termination" of the plans under Section 4041(b) of ERISA, 29 U.S.C. § 1341(b).

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[2] In a separate memorandum disposition filed today, we address the remedy imposed by the bankruptcy court.

During the summer of 2001, PACE proposed a merger of the seventeen pension plans that covered Crown's hourly employees into the PACE Industrial Union Management Pension Fund (PIUMPF), a Taft-Hartley Act multiemployer pension fund founded in 1963 for PACE union members. PACE preferred this option because PIUMPF in prior years had paid a thirteenth monthly check during the year, and thus merger offered the possibility that retirees might receive more than the minimum benefits. Additionally, PACE preferred the proposed merger because PIUMPF provided an established dispute resolution program for plan participants.

Crown's counsel met with a PACE representative in August of 2001 to discuss the merger, and expressed the view that Crown wanted to be assured of the financial stability of PIUMPF and the legality of the merger. The parties agreed that their attorneys and actuaries would further investigate the PIUMPF merger. On September 26, 2001, PIUMPF's actuary reported that the merger was feasible, and Crown's counsel requested more information from PIUMPF's counsel. That same day, Crown's board of directors met and reviewed bids for annuities, and learned that a "reversion" to the company of remaining assets in the plan would be possible if it terminated twelve of the pension plans through the purchase of an annuity.[3] The

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[3] The twelve plans were identified because they were "overfunded" and would therefore yield a surplus after the annuity had been purchased. Crown merged these twelve plans into one "Merged Plan" in order to purchase

(continued...)

board also learned about the proposed PIUMPF merger, and agreed to compare it to the annuity options once it received final bids.

On October 1, 2001, PIUMPF's counsel sent Crown's counsel a draft merger agreement. On October 4, Crown's counsel stated at a hearing in the bankruptcy court that it was looking into the possibility of a merger with PIUMPF. At this hearing, counsel represented that "before an action is taken as to these pension plans," the court would be notified. On October 8, PIUMPF's counsel sent Crown more information about the financial stability and legality of the merger.

Crown's board met on October 9, 2001, to review the final annuity bids with the understanding that they would expire within twenty-four hours. The bankruptcy court determined that the board did not seek a waiver of this deadline. At the time of the meeting, the board faced a forty-five day timetable for dissolving Crown, and Crown had $ 10,000 or less in the bank. The board did not consider the PIUMPF merger at this meeting, and it did not ask its actuary to analyze the proposed merger. Minutes of the October 9 meeting reflect that PBGC had agreed to release Crown under an annuitization of the pension plans, but not in a merger. The

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the annuity. The remaining five pension plans covering hourly workers were to remain the responsibility of Georgia Pacific Company, the successor to a prior plan sponsor.

bankruptcy court found that the board did not pursue a release from PBGC for a merger with PIUMPF. The board decided to purchase an annuity as a means of terminating the twelve merged pension plans (the Merged Plan) through Hartford Life Insurance Company, on the basis of Hartford's financial stability and a projected maximum reversion of nearly $5 million to Crown. Crown deposited over $84 million with Hartford the next day.

Appellees Edward Miller and Jeffrey Macek, on behalf of themselves and other similarly situated plan participants, and PACE, on behalf of its members and former member plan participants, filed suit in bankruptcy court. The plaintiffs alleged that Crown breached its fiduciary duties under ERISA by failing to "perform a diligent investigation into the PIUMPF [merger] proposal," and by failing to discharge its duties "solely in the interest of the participants and beneficiaries." After rendering oral findings of facts and conclusions of law, the bankruptcy court granted a preliminary injunction, ordering all cash assets remaining in the pension plan to be placed in an interest-bearing account, and that no reversion of assets to Crown could occur, pending the court's final decision on the allocation of the assets. The bankruptcy court also ordered the parties to report on the feasibility of distributing the reversion "for the benefit of the pension plan participants." Although the plaintiffs asked the bankruptcy court to void the annuity transaction with Hartford, the court declined to do so and allowed Crown to complete the termination process.

The parties stipulated to having the bankruptcy court's findings of fact and conclusions of law deemed a final ruling on the merits, and submitted a joint report setting forth a procedure for distribution of the residual assets for the benefit of the plan participants. The bankruptcy court entered an order approving the distribution of the assets to the plan participants. As noted, the court left the preliminary injunction in effect pending implementation of the distribution. Although no final judgment was entered, in light of the parties' stipulation we treat the district's order granting the preliminary injunction as the final judgment.

On appeal to the district court, Crown argued that neither appellees Miller and Macek nor PACE had standing and that it was neither subject to fiduciary obligations in terminating the plan, nor did it breach such duties. The district court held that appellees Miller and Macek had standing as plan participants to enforce Crown's fiduciary obligations, but dismissed PACE for lack of standing, because it was not an enumerated party under ERISA.[4] The district court affirmed the bankruptcy court's determination that Crown breached its fiduciary duties as well as the preliminary injunction granted by the bankruptcy court.

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[4] Crown now concedes that appellees Miller and Macek have standing. We address the issue of cross-appellant PACE's standing in Section III of this opinion.

II. Breach of Fiduciary Duties under ERISA

The parties do not dispute that the decision to terminate a pension plan is a business decision not subject to ERISA's fiduciary obligations, *see Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1432–33 (9th Cir. 1986), and *Amalgamated Clothing and Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988), whereas the *implementation* of a decision to terminate is discretionary in nature and subject to ERISA's fiduciary obligations. *See Waller v. Blue Cross of Cal.*, 32 F.3d 1337, 1342–44 (9th Cir. 1994). Crown does not challenge the bankruptcy court's finding that it failed fully to investtigate the PIUMPF merger option. Instead, Crown argues that both ERISA and the terms of the pension plan prohibit merger into a multiemployer plan as a means of termination; thus its decision to terminate, rather than to merge, was discretionary and not subject to fiduciary obligations. The merits of Miller and Macek's claim that Crown breached its fiduciary duties therefore turn on whether merger into a multiemployer plan is a permissible means of implementing a decision to terminate.

A. Standard of Review

We review the bankruptcy court's decision directly and therefore review de novo the district court's decision on appeal from the bankruptcy court. *Cellular 101, Inc. v. Channel Communications, Inc. (In re Cellular 101, Inc.)*, 377 F.3d 1092, 1095 (9th Cir. 2004); *Neilson v. United States (In re Olshan)*, 356 F.3d 1078, 1083 (9th Cir. 2004). We apply the same standard of review applied by the district

court, and review the bankruptcy court's legal conclusions de novo, and its findings of fact for clear error. *Olshan*, 356 F.3d at 1083.

B. Permissibility of Merger under the Terms of the Pension Plan

Before the district court and in this appeal, Crown has argued that the terms of its pension plan do not permit a merger as a means of termination. Crown failed to raise this argument before the bankruptcy court. As a general rule, we do not consider issues argued for the first time on appeal. *Citibank (S.D.), W.A. v. Eashai (In re Eashai)*, 87 F.3d 1082, 1085 n.2 (9th Cir. 1996). This rule applies to appeals from bankruptcy proceedings. *In re Southland Supply, Inc.*, 657 F.2d 1076, 1079 (9th Cir. 1981). We conclude that none of our recognized exceptions to this rule applies to this case. *Cf. Cold Mountain v. Garber*, 375 F.3d 884, 891 (9th Cir. 2004); Eashai, 87 F.3d at 1085 n.2. We therefore deem this argument waived.

C. Permissibility of Merger as a Means of Termination under ERISA

The bankruptcy court did not explicitly determine whether ERISA permits merger into a multi-employer plan as a means of terminating a single employer plan. Instead, the court assumed that this was permissible, finding "the decision whether to annuitize the plans or merge them into PIUMPF was . . . a discretionary act" subject to fiduciary duties. Because the bankruptcy court's interpretation of ERISA is a question of law, our review is de

novo. *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1178 (9th Cir. 2004); *Olshan*, 356 F.3d at 1083.

As Crown argues, ERISA § 4041(a)(1), 29 U.S.C. § 1341(a)(1), provides that the exclusive means of terminating a single-employer pension plan are: 1) institution of termination proceedings by the corporation under 29 U.S.C. § 1342; 2) standard termination under § 1341(b); and 3) distress termination under § 1341(c). The termination effected in this case was a standard termination. A standard termination requires that, "when the final distribution of assets occurs, the plan is sufficient for benefit liabilities." 29 U.S.C. § 1341(b)(1)(D). So long as the PBGC does not issue a notice of noncompliance, the plan administrator must distribute the assets. *Id.* § 1341(b)(2)(D); 29 C.F.R. §§ 4041.21(a), 4041.28(a), (c).

ERISA § 4041(b)(3), 29 U.S.C. § 1341(b)(3), sets forth the method for "final distribution of assets" for standard terminations. The assets are to be allocated according to the priorities listed in 29 U.S.C. § 1344. Next, the statutory section at issue in this case states:

> In distributing such assets, the plan administrator shall--
>
> (i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, *or*
>
> (ii) in accordance with the provisions of the plan and any applicable regu-

> lations, *otherwise fully provide all benefit liabilities under the plan.*

§ 1341(b)(3)(A) (emphasis added). Thus, ERISA explicitly provides for alternative means of terminating a pension plan. The implementing regulations are consistent:

> The plan administrator must, in accordance with all applicable requirements under the Code and ERISA, distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer *or in another permitted form.*

29 C.F.R. § 4041.28(c)(1) (emphasis added). Thus, the purchase of an irrevocable commitment from an insurer is not a requirement; other methods of termination are permitted as long as they are sufficient to cover plan liabilities.

Crown emphasizes that ERISA § 4041, 29 U.S.C. § 1341, and ERISA § 4232, 29 U.S.C. § 1412, which controls transfers between multiemployer and single-employer plans, are two "wholly separate sections of the statute," neither of which expressly permits mergers as a means of termination. Yet, as the district court persuasively reasoned, both 29 U.S.C. §§ 1341 and 1412 are included within ERISA Title IV, which covers the topic of "Plan Termination Insurance." Section 1412 falls under Subtitle E of Title IV, "Special Provisions for Multiemployer Plans." It would have been logical for Congress to place § 1412 within Title IV of ERISA because, as appellees Miller and Macek argue, one practical

effect of a merger or complete transfer is that at least one pension plan will cease to exist.

Crown cites *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co.*, 331 U.S. 519, 528–29, 91 L. Ed. 1646, 67 S. Ct. 1387 (1947), and *Scarborough v. Office of Personnel Management*, 723 F.2d 801, 811 (11th Cir. 1984), for the proposition that a statute's titles and headings cannot "limit the plain meaning of the text." Those cases, however, dealt with *unambiguous* statutory language. By contrast, where the statutory language is *ambiguous*, titles and headings may be used to clarify the meaning of statutory text. *See Natural Res. Def. Council v. EPA*, 915 F.2d 1314, 1321 (9th Cir. 1990). Here, the statutory language is unclear: whether Congress intended to permit mergers into multiemployer plans as a means of termination under 29 U.S.C. § 1341(b)(3)(A) is uncertain. Consideration of the placement of titles and headings clarifies the statutory text and supports the conclusion that mergers are a permissible means of termination.

Crown also argues that 29 U.S.C. § 1412(f)(3), which involves transfers between or mergers of multiemployer and single-employer plans, supports its argument that terminations are distinct from transfers between single and multiemployer plans. Section 1412(f)(3) states:

> No transfer to which this section applies, in connection with a termination described in section 1341a(a)(2) of this title, shall be effective unless the transfer meets such

> requirements as may be established by the corporation to prevent an increase in the risk of loss to the corporation.

Section 1341a refers to terminations of multiemployer plans. The text of § 1412(f)(3) implies that a transfer between a single and multiemployer plan can be "in connection with a termination" (albeit the termination of a multiemployer plan). Thus, § 1412(f)(3) fails to support Crown's argument that termination and merger into a multiemployer plan are mutually-exclusive actions.

Finally, Crown argues that a merger into a multiemployer plan does not constitute a "distribution" under 29 U.S.C. § 1341(b)(3). The terms "distribution" or "distribute" are not expressly defined in either ERISA or its implementing regulations. See 29 U.S.C. §§ 1002, 1301; 29 C.F.R. § 4041.2. Dictionary definitions of "distribute" include: "to divide among several or many: deal out; apportion esp. to members of a group or over a period of time: allot"; "dispense, administer"; and "to give out or deliver esp. to the members of a group." WEBSTER'S THIRD NEW INT'L DICTIONARY (1993). These definitions do not support the exclusion of mergers into multiemployer plans as a means of termination. As appellees Miller and Macek argue, the purchase of irrevocable commitments from an insurer to provide all benefit liabilities under the plan, pursuant to 29 U.S.C. § 1341(b)(3), such as the annuity to be provided by Hartford Life in this case, does not appear to satisfy the distribution requirement any more than would a merger into a multiemployer plan. Both scenarios would involve a

series of payments to plan beneficiaries over time, rather than a lump-sum payment at the time of termination.

In sum, the text of ERISA § 4041 and its implementing regulations is ambiguous at best and neither explicitly nor implicitly prohibits merger into a multiemployer plan as a means of termination of a pension plan. As the district court determined, § 1341(b)(3) provides for alternative means of termination, so long as they are consistent with the plan provisions, applicable regulations and "otherwise fully provide all benefit liabilities under the plan." We hold that neither the statute nor its implementing regulations preclude mergers into multiemployer plans as a method of providing such benefit liabilities. We therefore affirm the district court's ruling on this issue.

D. Merits of Breach of Fiduciary Duty Claim

Applying the test for a preliminary injunction, the bankruptcy court found serious questions as to whether Crown breached its fiduciary duties to plan participants by failing fully to investigate the proposed PIUMPF merger. As previously noted, because the parties stipulated to having the bankruptcy court's findings of fact and conclusions of law deemed a final ruling on the merits, we review the merits determination de novo. *Stratosphere Litig. L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137, 1142 (9th Cir. 2002). Crown has never argued that it fairly considered the PIUMPF proposal, instead staking its defense on the argument that merger into

a multiemployer plan is an impermissible means of termination.

ERISA requires fiduciaries to discharge their duties "solely in the interest of the participants and beneficiaries" and for the exclusive purposes of "(i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A). ERISA's "exclusive benefit" rule provides that, except in certain circumstances,

> the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

§ 1103(c)(1); *Resolution Trust Corp. v. Fin. Insts. Ret. Fund*, 71 F.3d 1553, 1556–58 (10th Cir. 1995). Corporate officers and directors often "serve in a dual fiduciary capacity," with simultaneous duties running both to pensioners, in their capacity as plan trustees, and to shareholders, as directors of the corporation. *See Friend v. Sanwa Bank Cal.*, 35 F.3d 466, 468–69 (9th Cir. 1994); *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982). Conflicts of interest created by these dual roles can lead to violations of ERISA's loyalty requirements. *Pilkington PLC v. Perelman*, 72 F.3d 1396, 1401–02 (9th Cir. 1995). We have stressed that where such conflicts arise, "decisions must be made with an eye single to the interests of the participants and beneficiaries." *Id.* at 1402 (quoting *Donovan*, 680

F.2d at 271). Furthermore, "fiduciaries may need to step aside, at least temporarily, from the management of assets where they face potentially conflicting interests." *Id.* at 1402 (quoting *Leigh v. Engle*, 727 F.2d 113, 125 (7th Cir. 1984)); *see also Waller*, 32 F.3d at 1341–44 (holding that plaintiff stated an ERISA claim for breach of fiduciary duty where it alleged fiduciary imprudently based the choice of an annuity provider on the size of a potential reversion).

The bankruptcy court found "that there are serious questions whether the conduct of Crown's officers and Board of Directors was directed more at fulfilling their fiduciary obligations to the creditors of an insolvent corporation than at fulfilling their fiduciary obligations to the corporation's pensioners." The court applied the standard set forth in *Leigh*:

> Where it might be possible to question the fiduciaries' loyalty, they are obliged at a minimum to engage in an intensive and scrupulous independent investigation of their options to insure that they act in the best interests of the plan beneficiaries.

727 F.2d at 125–26. The bankruptcy court determined that, whether motivated by the possibility of a reversion, Crown's "desperate financial circumstances," or the certainty of obtaining a release from the PBGC under an annuity option, Crown failed to make the requisite "intensive and scrupulous" investigation of investment options, including the proposed PIUMPF merger.

Crown's fiduciary obligation was to assure the payment of the promised defined benefits with as little risk of nonpayment as possible, not to use the fund's total assets to the beneficiaries' optimum benefit. *See generally Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440, 142 L. Ed. 2d 881, 119 S. Ct. 755 (1999) ("Since a decline in the value of a plan's assets does not alter accrued benefits, members similarly have no entitlement to share in a plan's surplus . . . ."); *cf. Collins v. Pension & Ins. Comm. of the S. Cal. Rock Prods. & Ready Mixed Concrete Ass'ns*, 144 F.3d 1279, 1282 (9th Cir. 1998) ("ERISA does not create an exclusive duty to maximize pecuniary benefits."). The bankruptcy court alluded to this limited obligation in stating that "had there been no prospect of a merger with another plan, then the Board's course of conduct almost surely would have passed muster." As the ERISA statute provides for reversions, *see* 29 U.S.C. § 1344, it can be permissible, depending on the governing plan's terms, for trustees to choose a termination option that provides for a reversion as long as the process employed is for the exclusive purpose of acting in the beneficiaries' interest. In making a decision among possible termination schemes, however, the reversion should not be taken into account, even to a minor extent, pursuant to the "eye single" principle of fiduciary responsibility to the beneficiaries. *See Pilkington*, 72 F.3d at 1401–02.

In *Pilkington*, plaintiffs alleged that pension trustees breached their fiduciary duty by choosing an annuity provider on the basis of the size of the potential reversion. *Id.* at 1401–02. Defendants

chose the lowest bidder, which resulted in the largest reversion, and the annuity provider defaulted shortly thereafter. *Id.* at 1397–98. In response to the defendants' argument that they chose an AAA or A+ rated annuity, we stated that "a mere ratings scan" does not satisfy a pension trustee's fiduciary duties. *Id.* at 1401. On the basis of "strong evidence that reversion maximization figured prominently" in the choice and that the trustees' "motivation may have deviated from that mandated by ERISA," we reversed a grant of summary judgment in favor of defendant trustees. *Id.*

As in *Pilkington*, the possibility of a reversion appears to have featured in the minds of the Crown trustees. The bankruptcy court, relying on *Pilkington*, stated that "the prospect of a reversion" was one of several possible factors that, individually or combined, "strongly suggests that the officers and directors of Crown did not make the 'intensive and scrupulous investigation of the plan's investment options' that the circumstances required particularly given their dual fiduciary capacity." The court concluded that "once the merger option was raised, the Board had a fiduciary duty to fully explore it and determine which option was truly in the beneficiaries' best interests. The fact that the company was out of cash and had a timetable for plan confirmation should have played no part in the determination.

We agree with the bankruptcy court that there is evidence that the fiduciaries' "motivation may have deviated" from the "eye single" focus on the interests of plan beneficiaries, as mandated by ERISA. *See id.*

at 1401–02 (quoting *Donovan*, 680 F.2d at 271). The risk to fund assets resulted from Crown's focus on an improper set of interests. *See Leigh*, 727 F.2d at 125 (stating that "under the section 404(a) duty of loyalty, the central question is whether the fiduciaries acted solely in the interests of the beneficiaries and for the exclusive purpose of providing them with benefits."). The bankruptcy court found evidence of divided loyalties and that Crown failed adequately to discharge its duties through thorough investigation. We conclude that the bankruptcy court did not err in determining that Crown breached its fiduciary duties by failing exclusively to prioritize the interests of plan participants and beneficiaries and failing to make the "intensive and scrupulous investigation of the plan's investment options." *See Leigh*, 727 F.2d at 125–26. We therefore affirm the district court's determination on this issue.

III. Standing

The district court held that PACE lacked standing on the ground that ERISA § 502(a), 29 U.S.C. § 1132(a), confers exclusive enforcement authority on plan participants, beneficiaries, fiduciaries, employers, states, and the Secretary of Labor. It further held that PACE lacked standing under ERISA § 4070, 29 U.S.C. § 1370(a), which confers standing on unions to enforce the termination procedures of ERISA, because its complaint did not allege that Crown violated the termination provisions of ERISA § 4041, 29 U.S.C.

§ 1341.[5] We review the district court's determination of standing de novo. *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003).

On cross-appeal, PACE argues that, in light of liberal notice pleading rules, the district court should have construed its complaint broadly to include allegations that Crown violated the termination provisions of ERISA § 4041. Alternatively, PACE requests leave to amend its complaint to include such allegations.

Crown does not contest the district court's determination that plaintiffs Miller and Macek have standing. Crown contends that we need not address whether PACE has standing because the appeal will proceed regardless of whether PACE is a party. *See Sys. Council EM-3 v. AT&T Corp.*, 333 U.S. App. D.C. 63, 159 F.3d 1376, 1378–79 (D.C. Cir. 1998) (declining to decide whether union had standing to bring ERISA claims in light of plan beneficiaries'

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[5] Although Crown did not raise the issue of PACE's standing before the bankruptcy court, the district court addressed the issue on jurisdictional grounds, citing *Pershing Park Villas Homeowners Association v. United Pacific Insurance Company*, 219 F.3d 895, 899 (9th Cir. 2000) (noting that "because issues of constitutional standing are jurisdictional, they must be addressed whenever raised," whereas "objections to nonconstitutional standing not properly raised before the district court" may be waived), and *Curtis v. Nevada Bonding Corporation*, 53 F.3d 1023, 1027 (9th Cir. 1995) (reiterating that "a plaintiff's standing under [ ] § 1132(a)(1) is a prerequisite to ERISA jurisdiction.").

standing) (citing *Craig v. Boren*, 429 U.S. 190, 192–93, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976)). As an entity that collectively bargains for pension rights, however, PACE has institutional resources and experience to enforce ERISA, and it may be in a better position to protect the rights of all of its members. We conclude that, despite the fact that this litigation may proceed on the basis of Miller and Macek's standing, the presence or absence of PACE as a party remains a relevant issue.

Pursuant to ERISA § 4070, 29 U.S.C. § 1370, unions have standing to seek equitable relief for violations of ERISA §§ 4041, 4042, 4062–64, and 4069, 29 U.S.C. §§ 1341, 1342, 1362–64, 1369, which relate to termination procedures. The district court held that because PACE's complaint failed to state claims under ERISA §§ 4041, 4042, 4062–64, or 4069 for improper termination by Crown, and because the issue in this action is whether Crown breached its fiduciary duties, PACE did not have standing under § 4070.

PACE's first amended complaint did not explicitly allege violations of the termination procedures. Instead, it focused on Crown's breaches of fiduciary duty in failing adequately to consider the PIUMPF merger. PACE argues that there is a fiduciary duty overlay that permeates ERISA, and thus § 4070 provides a union with standing to enforce a breach of such duties in the context of plan termination. PACE requests that we grant it leave to amend its complaint to allege violations of ERISA's termination procedures, thus bringing it within the grant of standing for unions in § 4070. Because both parties

should have the opportunity to address this issue, we remand to the bankruptcy court so that it may consider in the first instance PACE's request to file an amended complaint and its new theory of standing. *See United Union of Roofers, Waterproofers and Allied Trades No. 40 v. Ins. Corp. of Am.*, 919 F.2d 1398, 1402 (9th Cir. 1990) (remanding for determination of union's new theory of standing).

IV. Conclusion

We hold that merger into a multiemployer plan is a permissible means of terminating a pension plan under ERISA. We further hold that the bankruptcy court did not err in concluding that the Crown board breached its fiduciary duties by failing adequately to consider the PIUMPF merger and in order to prioritize the interests of plan participants and beneficiaries. We therefore affirm the district court's ruling on these issues. Finally, we vacate the district court's determination that PACE lacks standing, grant PACE's request for leave to amend its complaint to better articulate the basis for its standing, and remand the standing issue to the district court with instructions to remand to the bankruptcy court.[6]

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[6] The appellees/cross-appellant have submitted two requests for judicial notice in this court. In the first request, received on February 16, 2004, appellees/cross-appellant ask that we take judicial notice of Crown's motion for order authorizing the Liquidating Trustee to pay an adjustment premium to the Hartford Life

(continued...)

AFFIRMED in part; VACATED in part; and REMANDED.

Insurance Company, the bankruptcy court's order granting this motion, and appellees/cross-appellant's notice of appeal. In the second request, received on June 7, 2004, appellees/cross-appellant request that we take judicial notice of PACE's First Amended Petition to Compel Arbitration and Complaint for Breach of the Terms of Collective Bargaining Agreements, filed in the bankruptcy court on October 2, 2002, and the transcript of a January 22, 2003 petition to compel arbitration. Appellees/cross-appellant have not adequately explained why these documents are relevant or on what grounds this court should take judicial notice of them. We therefore deny these requests.

JEFFREY H. BECK,
LIQUIDATING TRUSTEE OF THE ESTATES OF
CROWN VANTAGE, INC. AND CROWN PAPER COMPANY,
Appellant,

v.

PACE INTERNATIONAL UNION,
ON BEHALF OF MEMBER AND FORMER MEMBER
PARTICIPANTS IN PENSION PLANS SPONSORED BY THE
DEBTORS;

EDWARD MILLER; JEFFREY D. MACEK,
ON BEHALF OF THEMSELVES
AND OTHERS SIMILARLY SITUATED,
Defendants-Appellees.

PACE INTERNATIONAL UNION, AFL-CIO,
CHEMICAL & ENERGY WORKERS INTERNATIONAL
UNION, ON BEHALF OF MEMBERS AND FORMER
MEMBER PARTICIPANTS IN PENSION PLANS,
Defendant-Appellant,

v.

JEFFREY H. BECK,
LIQUIDATING TRUSTEE OF THE ESTATES OF
CROWN VANTAGE, INC. AND CROWN PAPER COMPANY,
Appellee.

No. 03-15303, No. 03-15331

United States Court of Appeals
for the Ninth Circuit

146 Fed. Appx. 917

For JEFFREY H. BECK, Liquidating Trustee of the Estates of Crown Vantage, Inc. and Crown Paper Company, Appellant: Stephen A. Kroft, Esq., Rodger M. Landau, McDERMOTT WILL & EMERY, LLP, Los Angeles, CA.

For PACE INTERNATIONAL UNION, on behalf of member and former member particpants in pension plans sponsored by the the Debtors, EDWARD MILLER, JEFFREY D. MACEK, on behalf of themselves and others similarly situated, Defendants - Appellees: Christian L. Raisner, Esq., John Plotz, Esq., WEINBERG, ROGER & ROSENFELD, Oakland, CA.

Before: REINHARDT, PAEZ, and BERZON, Circuit Judges.

MEMORANDUM*

In an opinion published today, we hold that the bankruptcy court did not err in concluding that the Crown board breached its fiduciary duties under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. §§ 1001–1461,

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

affirm the district court's ruling on this issue, and remand the issue of PACE's standing. Crown challenges the remedy imposed by the bankruptcy court. We have jurisdiction pursuant to 28 U.S.C. § 158(d), and we affirm.

Bankruptcy courts have broad authority to order appropriate equitable relief. *See, e.g., Johnson v. Home State Bank*, 501 U.S. 78, 88, 115 L. Ed. 2d 66, 111 S. Ct. 2150 (1991) ("The bankruptcy court retains its broad equitable power to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code].") (internal quotation marks and citation omitted, second alteration in original). Moreover, ERISA § 502(a)(3) specifically recognizes that plan participants, beneficiaries or fiduciaries may obtain injunctive or "other appropriate equitable relief" to redress ERISA violations or to enforce ERISA provisions. 29 U.S.C. § 1132(a)(3). ERISA § 409 contains a "catchall" relief provision subjecting a fiduciary to personal liability for "such other equitable or remedial relief as the court may deem appropriate." 29 U.S.C. § 1109(a); *Amalgamated Clothing & Textile Workers Union v. Murdock*, 861 F.2d 1406, 1414 (9th Cir. 1988) ("When a fiduciary has breached one of his statutorily defined duties to an ERISA plan, then the catchall relief provision of § 409(a) may be used to fashion a remedy that inures to the benefit of the plan as a whole.") (internal quotation marks and citation omitted). We review the bankruptcy court's choice of remedies for an abuse of discretion. *Bankr. Receivables Mgmt. v. Lopez, (In re Lopez)*, 345 F.3d

701, 705 (9th Cir. 2003), *cert. denied*, 541 U.S. 987, 158 L. Ed. 2d 491, 124 S. Ct. 2015 (2004).

Following the bankruptcy court's determination that Crown breached its fiduciary duties to plan participants and beneficiaries, the court issued a preliminary injunction ordering that Crown maintain the residual assets of the plan in an interest-bearing account pending a final decision on the allocation of the assets. Pursuant to the bankruptcy court's order, the parties submitted a joint report setting forth a procedure for distribution of the residual assets for the benefit of the plan participants. The bankruptcy court entered an order approving the distribution plan and left the preliminary injunction in effect pending implementation of the distribution.

Crown argues that by approving the distribution plan, the bankruptcy court improperly imposed a constructive trust over the residual assets of the plan. By the terms of its order, the bankruptcy court did not characterize the remedy it imposed as a constructive trust. Rather, having found a breach of fiduciary duties under ERISA, the bankruptcy court exercised its broad equitable power and approved a distribution of plan assets as set forth by the parties. Under all of the circumstances, we fail to see how the bankruptcy court abused its discretion in awarding this relief.

AFFIRMED.

App. 29

JEFFREY H. BECK,
LIQUIDATING TRUSTEE OF THE ESTATES OF
CROWN VANTAGE, INC., AND CROWN PAPER COMPANY,
Appellant,

vs.

PACE INTERNATIONAL UNION,
ON BEHALF OF MEMBERS AND FORMER MEMBER
PARTICIPANTS IN PENSION PLANS SPONSORED BY THE
DEBTORS;

EDWARD J. MILLER, JEFFREY D. MACEK
ON BEHALF OF THEMSELVES
AND OTHERS SIMILARLY SITUATED,
Appellees.

No. C 02-1407 MHP

United States District Court
for the Northern District Of California

2003 U.S. Dist. LEXIS 2283
29 Employee Benefits Cas. (BNA) 2601

January 10, 2003, Decided
January 10, 2003, Filed

For Crown Vantage, Inc., Appellant: Judith Germano, Mary Warren, Shearman & Sterling, New York, NY. Roger M. Landau, McDermott, Will & Emery, Los Angeles, CA.

For Pace International Union, Appellee: Christian L. Raisner, Van Bourg, Weinberg, Roger & Rosenfeld, Oakland, CA.

MARILYN HALL PATEL, Chief Judge.

MEMORANDUM AND ORDER

Jeffrey H. Beck, the liquidating trustee of the estates of Crown Vantage, Inc. and Crown Paper Co. ("Crown"), appeals the bankruptcy court's order directing that Crown's prior employer contributions to the pension plans in excess of annuity costs, or a reversion, be held in an interest-bearing account.[1] The order was based on the bankruptcy court's holding that Crown breached the fiduciary duty owed to the pension plan participants under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C § 1001 et seq., by failing to consider an alternative to annuitizing the pension funds. Having considered the parties' arguments and submissions and for the reasons set forth below, the court rules as follows.

BACKGROUND

Crown filed Chapter 11 petitions in the bankruptcy court on March 15, 2000, which led to a

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[1] The bankruptcy court also directed the parties to investigate and report to the court on the feasibility of distributing the reversion to plan participants instead of the liquidating trustee for the benefits of Crown's creditors.

piecemeal liquidation of the companies' assets. The bankruptcy court found that as of June 2001 the sale proceeds was not even enough to cover the companies' secured liabilities. Tr. Hr'g, Dec. 11, 2001 (Excerpts of R., Vol. I, Tab 2, Bates 025) (same as Vol. II, Tab 7, Bates No. 392). Crown had to wind down the operations and move to a Chapter 11 plan confirmation. Members of Crown's Board of Directors ("Crown's directors") were also the trustees for Crown's eighteen pension plans, including one for salaried employees and the rest for hourly rate employees.

Crown faced urgent issues regarding the pension plans. The Pension Benefit Guarantee Corporation ("PBGC") had filed Proofs of Claims in the millions if PBGC were forced to assume the liabilities for any of these eighteen plans. The bankruptcy court found PBGC's Proofs of Claims to be "a stumbling block to [Chapter 11] plan confirmation." Tr. Hr'g, Dec. 11, 2001 (Excerpts of R., Vol. I, Tab 2, Bates No. 026). It was also unclear whether any of the plans had sufficient assets to meet plan liabilities through the purchase of an annuity and thus could be terminated. Crown therefore engaged Dietrich & Associates ("Dietrich") in July 2001 to obtain quotes from insurance companies for an annuity. Dietrich obtained preliminary bids for Crown starting on August 30, 2001, and Crown's Directors were surprised to find out that they were able to annuitize at least some of the pension plans. Tr. Hr'g, Nov. 29, 2001, (Excerpts of R. Vol. I, Tab 5, Bates Nos. 307–08). In order to purchase an annuity, Crown merged twelve of the seventeen hourly rate employee

pension plans into a Merged Plan. J. Report at 2, Feb. 12, 2002 (Excerpts of R., Vol. II, Tab 8).

During the summer of 2001, Pace International Union ("Union") suggested a possibility to merge Crown's seventeen union plans into the Pace Industrial Union Management Pension Fund ("PIUMPF"), a multi-employer pension fund for members of the Union. The bankruptcy court found that this merger would be superior to standard termination in two ways. First, the retirees might received more than the minimum benefits under the merged plans because PIUMPF had occasionally paid pensioneers a thirteenth monthly check during the year. Second, the employees could resort to an established dispute resolution program under the merged plans. Tr. Hr'g, Dec. 11, 2001 (Excerpts of R., Vol.1, Tab 2, Bates No. 027).

However, the bankruptcy court found that Crown's directors never seriously considered the merger proposal. Tr. Hr'g, Dec. 11, 2001 (Excerpts of R., Vol. I, Tab 2, Bates No. 031–033). Crown's directors were never presented any document pertinent to the proposed merger on or before October 9, 2001. Nor did they request an analysis of the PIUMPF offer and thereby compare the risks and benefits of the PIUMPF merger with annuitization. One of Crown's directors testified that the merger was never a viable alternative to annuitization because PIUMPF is a multi-employer plan in a weak industry. The only indication that the directors considered the merger proposal is a statement in the minutes of the October 9, 2001 board meeting that PBGC allegedly had reservation about a merger with

PIUMPF and therefore might not release Crown for a Chapter 11 confirmation. But the bankruptcy court found no evidence that Crown's attorneys pursued a release from PBGC under the proposed merger and cited rebuttal evidence that a PBGC attorney involved in Crown's pension plan matters never stated any reservations or concerns about a merger with PIUMPF. Tr. Hr'g, Dec. 11, 2001 (Excerpts of R., Vol. I, Tab 2, Bates No. 032).

Instead, Crown's directors decided on October 9, 2001 to accept the bid which would have expired within twenty-four hours from Hartford Life Insurance Company, an insurance company qualified as an annuitant based on Dietrich's analysis. Crown signed an agreement the next day to deposit with Hartford over eighty four million dollars from the Merged Plan assets. After the payment of the annuity premium, approximately five million dollar in assets remained in the Merged Plan. The bankruptcy court found no evidence suggesting that Crown's directors sought an extension or waiver of the twenty-four hour deadline. However, Dietrich's president, Robert Schaefer, testified that such bids from potential annuitants were usually good for only one day because of the volatile nature of the investment market. Tr. Hr'g, Nov. 29, 2001 (Excerpts of Record, Vol. I, Tab 5, Bates No. 232).

The bankruptcy court found that Crown had determined to annuitize the pension plans perhaps as early as when preliminary annuity bids were submitted on August 30, 2001 and failed to consider the PIUMPF merger proposal seriously. Tr. Hr'g,

Dec. 11, 2001 (Excerpts of R., Vol. I, Tab 2, Bates Nos. 032–033). The bankruptcy further held that the decision whether to annuitize the plans or merge them into PIUMPF was a discretionary act subject to fiduciary responsibilities as mandated by ERISA and the case law. Tr. Hr'g, Dec. 11, 2001 (Excerpts of R., Vol. I, Tab 2, Bates No. 036). Finding evidence that Crown was motivated to choose annuitization instead of merger by factors other than the pension plan participants' best interests, the bankruptcy court held that Crown's officers and directors breached their fiduciary duty under ERISA and consequently granted a preliminary injunction against Crown. Instead of attempting to undo the annuitization by Hartford, the bankruptcy court ordered that any reversion paid by the insurer be placed into an interest-bearing account as a constructive trust pending a final decision. The parties were also directed to investigate and then report to the court on the feasibility of investing this reversion into one or more pension plans. Before the court now is Crown's appeal from this preliminary injunction. The appellees ("Pace") include the Union, on behalf of members and former member participants sponsored by Crown, a Edward J. Miller and a Jeffrey D. Macek on behalf of themselves and others similarly situated.

LEGAL STANDARD

The court reviews the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. See *Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 191 (9th Cir. 1995). A factual finding is clearly erroneous if the appellate court, after

reviewing the record, has a definite conviction that a mistake has been made. *Beauchamp v. Hoose (In re Beauchamp)*, 236 B.R. 727, 729 (B.A.P. 9th Cir. 1999). Findings of fact based on credibility are given particular deference by reviewing courts. *Id.* at 730. Mixed questions of fact and law are reviewed de novo. *Id.*

DISCUSSION

There are two main issues on appeal. First, Crown argues, for the first time, that none of the appellees has standing to bring this action. Second, Crown argues that no fiduciary duty under ERISA was implicated when Crown's Directors decided to annuitize the pension plans at issue instead of merging them into PIUMPF. Standing, as a threshold issue, is addressed first.

I. Standing

Crown appears to be arguing that the appellees lack both constitutional standing and a statutory cause of action to prosecute the claims under ERISA. Because the purchase of an annuity did not result in any loss recognized by ERISA to the pension plans at issue, Crown contends that none of the appellees possesses standing to assert a claim for breach of fiduciary duty under ERISA. Crown further argues that the Union is not an enumerated party under ERISA and therefore has no standing to enforce ERISA. 29 U.S.C. § 1132(a) (empowering participants, beneficiaries or fiduciaries to bring a civil action to enforce ERISA benefit rights under Subchapter I of ERISA, 29 U.S.C. §§ 1001–1191).

Finally, Crown argues that Miller and Macek, the other appellees, do not have standing because they not participants in all the pension plans at issue.

Although appellees' standing was never raised before the bankruptcy court, the court may not waive this issue in the present action. "Constitutional standing concerns whether the plaintiffs stake in the lawsuit is sufficient to make out a concrete 'case' or 'controversy' to which the federal judicial power may extend under Article III [of the Constitution]," the issues of which are "jurisdictional" and therefore "must be addressed whenever raised." *Pershing Park Villas Homeowners Ass'n. v. United Pacific Ins. Co.*, 219 F.3d 895, 899 (9th Cir. 2000). Further, the Ninth Circuit has repeatedly held that "a plaintiffs standing under section 1132(a)(1) is a prerequisite to ERISA jurisdiction." *Curtis v. Nevada Bonding Corp.*, 53 F.3d 1023, 1026–27 (9th Cir. 1995) (citing three other Ninth Circuit decisions to support the holding that "federal courts lack subject matter jurisdiction if the plaintiff in an action for benefits owed under an ERISA plan lacks standing to bring a civil suit enforcing ERISA under 29 U.S.C. § 1132(a)(1)(B)"). *See also Local 159, 342, 343 & 344 v. Nor-Cal Plumbing, Inc.*, 185 F.3d, 978, 981 (9th Cir. 1999). Therefore, the issues of standing under the statute as well as issues of constitutional standing cannot be waived and the court must address them on appeal. *Cf. United Pacific Ins.*, 219 F.3d at 899 (distinguishing constitutional standing and prudential standing and finding that the issues of nonconstitutional standing not properly raised before the district court are waived).

A. PACE International Union

Many courts have found that the list of entities empowered by section 1132(a) is exclusive. 29 U.S.C. § 1132(a). For example, the Third Circuit stated: "It is clear from the statute that labor unions are neither participants nor beneficiaries, and consequently plaintiff does not fall within the provision." *New Jersey State AFL-CIO v. New Jersey*, 747 F.2d 891, 893 (3d Cir. 1984). The D.C. Circuit affirmed a lower court's findings that "under the plain language of the statute, the Union Plaintiffs do not have standing to bring an ERISA action" and the union standing issue under ERISA was distinct from constitutional standing issues implicated by an association's bringing actions on behalf of its members. *Systems Control EM-3 v. AT&T Corp.*, 972 F. Supp. 21, 27 (D.D.C. 1997), *aff'd*, 333 U.S. App. D.C. 63, 159 F.3d 1376 (D.C. Cir. 1998). The Six Circuit also affirmed a district court's holdings that "the Union, simply by virtue of its status as a labor union, does not fall within those who are designated by the statute as capable of bringing an ERISA action," that although "an ERISA claim may derive from a collective bargaining agreement negotiated by a union, Congress has obviously chosen not to include a labor union as an appropriate party to vindicate employees' rights under ERISA." *International Union v. Auto Glass Employees Fed. Credit Union*, 858 F. Supp. 711, 721–22 (M.D. Tenn. 1994), *aff'd*, 72 F.3d 1243 (6th Cir. 1996). See also, *Communications Workers of Am. v. SBC Disability Income Plan*, 80 F. Supp.2d 631 (W.D. Tex. 1999) (discussing many cases where

courts found the list of empowered entities under section 1132(a) to be exclusive and dismissing the union plaintiff); *United Food & Commercial Workers Local 204 v. Harris-Teeter Super Markets. Inc.*, 716 F. Supp. 1551, 1561 (W.D.N.C. 1989) (holding that the union lacks standing as a plaintiff under section 1132(a)). Therefore, unions, which are neither participants nor beneficiaries, do not possess standing to bring a civil action under section 1132. 29 U.S.C. § 1132 (civil enforcement of ERISA benefits and rights as afforded by Subchapter I of ERISA governing the protection of employee benefit rights, 29 U.S.C. §§ 1001–1191, and separate from Subchapter III of ERISA governing the plan termination insurance, 29 U.S.C. §§ 1301–1461).[2]

Although Pace attempts to argue that the Ninth Circuit's answer to this issue might be different, the court is not convinced. Crown correctly pointed out the defects in Pace's reasoning: the Ninth Circuit case cited by Pace relied on the faulty analysis in *Fentron Indus. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1305 (9th Cir. 1982), that "ERISA § 502(a) [29 U.S.C. § 1132(a)] does not provide an exhaustive list of eligible plaintiffs." *Amalgamated Clothing & Textile Workers Union v. Murdock*, 861

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[2] Crown correctly states that only the "enumerated entities [in section 1132(a)] may bring civil actions based upon breach of fiduciary duty." Appellant's Br., at 19:27-19:28. As Pace conceded, although in a footnote, "most courts which have considered the issue have held that unions do not have standing to assert the ERISA claims of their members." Appellees Br., at 21, n.7.

F.2d 1406, 1410, n.6 (9th Cir. 1988). In fact, the Ninth Circuit noted that Fentron "has been twice repudiated by the Supreme Court." *Cripps v. Life Ins. of North Am.*, 980 F.2d 1261, 1265 (9th Cir. 1992). Cripps discussed *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 145–47, 87 L. Ed. 2d 96, 105 S. Ct. 3085, 3092 (1985), which held that section 1132 contains comprehensive and "carefully integrated" enforcement provisions demonstrating Congress's intention not to authorize other remedies not provided for in the statute. *Cripps*, 980 F.2d at 1265. Cripps further relied on *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983), which held that "ERISA carefully enumerates the parties entitled to seek relief under § 502 [29 U.S.C. § 1132]" and does not empower anyone other than the listed entities to assert ERISA claims. *Cripps*, 980 F.2d at 1265. The Supreme Court reinforced its holdings during the last term, noting that "ERISA's 'carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209, 151 L. Ed. 2d 635, 122 S. Ct. 708, 712 (2002) (quoting *Mertens v. Hewitt Associates*, 508 U.S. 248, 254, 124 L. Ed. 2d 161, 113 S. Ct. 2063, 2067 (1993)) (emphasis in original) (citations omitted). Because section 1132 provides an exclusive list of those who can assert ERISA claims to enforce employee benefit rights, this court was convinced that "if the Ninth Circuit is confronted with the issue of whether an employer can bring suit to enforce claims against an ERISA

fiduciary it will fully overturn Fentron." *Tool v. National Employee Benefit Servs.*, 957 F. Supp. 1114, 1117 (N.D. Cal. 1996). The same rationale applies with equal force in the present action and therefore the Union does not have standing under section 1132 to sue Crown for breach of ERISA fiduciary duties.[3]

Pace argues that section 4070 of ERISA, 29 U.S.C. § 1370, explicitly provides the Union standing to bring this action. This argument is premised on Pace's assertion that "the present suit concerns improper termination of a plan under section 1341." However, improper termination in violation of section 1341 is not at issue in the present action. See 29 U.S.C. § 1341. First, until the reply brief on appeal, Pace never asserted any violation by Crown under section 1341. The First Amended Complaint filed on November 19, 2001, the operative pleading in the present action, only alleged ERISA jurisdiction under sections 1132 (a)(2) and (e)(1). First Am. Compl. (Excerpts of R., Vol I. Tab 4, Bates No. 062). More importantly, the issue in this action is whether Crown's directors breached their fiduciary obligations to the pension plan participants and beneficiaries in choosing a termination by annuitization over a merger with PIUMPF, even when the termination in and of itself fully complies

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[3] Accordingly, it is not necessary to address the issue whether the alleged lack of financial harm to the pension plans would deprive the Union of standing under ERISA.

with section 1341.[4] See 29 U.S.C. § 1104 (on fiduciary obligations); 29 U.S.C § 1341 (on termination).

B. Miller & Macek

Crown first argues that none of the appellees has standing under ERISA because the annuity policy would satisfy all the accrued benefits afforded by the pensions plans at issue. The court is not convinced that the authority cited by Crown applies to the present action where the reversion, arguably surplus of the pension plans, was generated by the plan fiduciaries' questionable act that may have constituted a breach of the duty of loyalty. Crown relies on Hughes Aircraft Co. v. Jacobson, which held that participants in defined benefit pension plans have "a nonforfeitable right only to their 'accrued benefit'" and "no entitlement to share in a plan's surplus." 525 U.S. 432, 439, 142 L. Ed. 2d 881, 119 S. Ct. 755, 761 (1999). However, in Jacobson, the company "did not use the surplus for its own benefit."[5] *Id.* Further, there was no issue of

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[4] The bankruptcy court stated: "Had there been no prospect of a merger with another plan, then the Board's court of conduct in choosing Hartford almost surely would have passed muster." TR. Hr. Dec. 11, 2001, Excerpts of Record, Vol. I, Tab 2, Bates No. 035.

[5] As addressed in the next section, the most dispositive fiduciary obligation implicated in the present action is the duty of loyalty. Using surplus to the fiduciary's own benefit certainly raises the issue of loyalty. This appears to be the driving force behind the bankruptcy court's decision: Crown had dual fiduciary obligations to the

(continued...)

fiduciary duties, "because ERISA's fiduciary provisions are inapplicable to the amendments [by Hughes to the benefit plans]." *Id.* at 443. Crown further cites Harley v. Minnesota Mining & Mfg. Co., which relied on Jacobson to dismiss ERISA claims that the pension plan fiduciaries failed to investigate and monitor the investment using the pension fund assets when the defined benefit plan at issue had a substantial surplus. 284 F.3d 901, 906 (8th Cir. 2002) (citing *Jacobson*, 525 U.S. at 440, that a "loss to Plan surplus is a loss only to . . . the plan's sponsor"). However, Harley also did not involve a breach in duty of loyalty because: the plan fiduciaries did not use the surplus for their own benefits. *Id.*

Further, Jacobson and Harley do not purport to overturn decisions such as *Waller v. Blue Cross of California*, 32 F.3d 1337, 1339 (9th Cir. 1994). Waller found that the pension plan participants "have standing to pursue the equitable remedy of a constructive trust to distribute defendants' allegedly ill-gotten profits [by a bidding process geared solely toward selecting an annuity policy that would enable

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creditors of an insolvent corporation as well as to the pension plan participants. In electing to terminate the pension plans by, annuitization as motivated by the prospect of a reversion interest beneficial to the creditors while failing to investigate an alternative which may better serve the pension plan participants' interests, Crown breached the duty of loyalty as the fiduciaries of the pension plans.

defendants to obtain the maximum reversion possible] to the former participants and beneficiaries of the plan." *Id.* Crown's interpretation of Jacobson and Harley also contradicts Leigh v. Engle, which held that "ERISA clearly contemplates actions against fiduciaries who profit by using trust assets, even where the plan beneficiaries do not suffer direct financial loss." 727 F.2d 113, 121–22 (7th Cir. 1984) (quoting section 1109(a), 29 U.S.C. § 1109(a), to support the holding that "[a] fiduciary who breaches his duties "shall be personally liable . . . to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary"). In Waller and Leigh, the participants suffered no financial harm to their accrued benefits. However, the plan fiduciaries did not act "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). Therefore, even if Hartford's annuity policy would satisfy all accrued benefits under the pension plans in question, the plan participants can assert ERISA claims against the fiduciaries when the plan assets were used to purchase the annuity in order to generate a reversion that serves an interest in conflict with that of the plan participants.

Crown then argues that Miller and Macek cannot represent the participants in the eight plans that Miller and Macek did not originally belong to because of the uncertainty about which original plans the reversion of approximately five million dollars was attributable to. Miller and Macek (and other similarly situated) were participants of four pension plans, Plan No. 1-1, Frozen Plan No. 1-1,

Adams Plan and Frozen Adams Plan. Appellee's Br., at 22:8–22:9. These four plans together with seven other plans were merged into Plan No. 7 to form the Merged Plan, which was terminated under the standard termination procedure. Appellee's Supp. Excerpts of R., Tab 14. Therefore, Miller and Macek were participants of the Merged Plan. Accordingly, they can represent other participants in the Merged Plan, which would include the participants in all twelve original plans. As plan participants, they are clearly an enumerated party, under ERISA and therefore entitled to enforce the fiduciary obligations of the plan administrator for the Merged Plan[6] pursuant to section 1104. 29 U.S.C. § 1132 (on civil enforcement); 29 U.S.C. § 1104 (on fiduciary obligetions). Crown's argument that the reversion might be attributable to plans other than Miller and Macek's original four plans is unrelated to the standing issue. Rather, it would only become relevant if and when the parties determined that it was feasible to re-invest the reversion into the pension plans at issue.[7] This goes solely to the equitable remedy that may be fashioned. Miller and Macek can assert claims of the Merged Plan. The claims

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[6] It is undisputed that Crown's Directors remained as the plan administrator for the Merged Plan.

[7] In this aspect, therefore, the bankruptcy court's order of establishing a constructive trust for the five million-dollar reversion and requesting parties' investigation and report on the feasibility of re-investing the reversion into one or more of the pension plans is proper.

are the Plan's, not the individual plaintiff participant's.

II. Breach of Fiduciary Duty

Crown also argues that Crown's directors did not owe a fiduciary duty to the plan participants and beneficiaries choosing an annuity policy to terminate the plans was a business decision. And even if a merger with PIUMPF is an alternative method to terminate the plans, Crown's Directors were not allowed to do so under the terms of the pension plans. Crown further argues that the directors did not breach their fiduciary duty in choosing Hartford instead of other insurance carriers, which is not disputed by the appellees.[8]

The parties agree that Crown's decision to terminate the pension plans, as a business decision, did not raise any issues of fiduciary obligations under ERISA. They dispute, however, whether the decision to choose the Hartford annuity policy over a merger with PIUMPF was shielded by the business judgment rule. Crown argues that a merger with PIUMPF is an alternative to a decision to terminate rather than an alternative way of terminating the plans. The bankruptcy court, however, found that the merger was an alternative way of implementing

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[8] See *supra* note 3 (The bankruptcy court did not find Crown's choosing Hartford over other annuitants questionable.) Pace does not argue otherwise on appeal.

the decision to terminate and therefore not a business decision.[9]

Crown contends that ERISA does not envision termination by merger. The argument, however, is not persuasive. Section 1341 and section 1412 govern standard termination of a single employer pension plan and transfers between a multi-employer plan and a single employer plan, respectively. 29 U.S.C. §§ 1341, 1412. Nevertheless, Crown fails to note that both sections are in the same Subchapter III of ERISA entitled "Plan Termination Insurance." More importantly, the plain statutory language governing standard termination demonstrates that a merger in addition to annuitization can be a method of implementing the termination procedure. Section 1341(b)(3) states: "In distributing [plan] assets [pursuant to the standard termination of the plan under this subsection], the plan administrator shall (i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or (ii) in according with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan." 29 U.S.C.

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[9] The bankruptcy court stated: "Although the decision to terminate a plan is a business decision, both ERISA and the case law impose fiduciary responsibilities as to discretionary actions taken to implement that decision. . . . The decision whether to annuitize the plans or merge them in for PIUMPF was such a discretionary act." Tr. Hr'g, Dec. 11, 2001 (Excerpts of R., Vol. II, Tab 7, Bates No. 403).

§ 1341(b)(3). Therefore, a plan administrator can implement a merger to terminate a plan, if the merger can cover all benefit liabilities under the plan and complies with the terms of the plan and "any applicable regulations."

Crown further argues that a merger with PIUMPF is not allowed under the terms of the pension plans at issue. The pertinent terms provide that any distributions on termination from the pension fund "may be effectuated in the discretion of the plan administrator by the purchase of nontransferable annuities, or by continuing the Retirement Fund in existence, or by a cash settlement with any Member with the Member's consent." § 12.4, Excerpts of R. Vol. I, Tab 9, Bates No. 386. Crown maintains that a merger with PIUMPF would contradict these terms and constitute breach of ERISA duties. But these terms should not be interpreted as exclusive. The next section in the term sheet concerns "merger or consolidation of the Plan with, or the transfer of assets and liabilities of the Plan to, any other employee benefit plan." § 12.5, Excerpts of R. Vol. I, Tab 9, Bates No. 386. This section also provides that "each Member in the Plan will (if the Plan had then terminated) receive a benefit immediately after the merger, consolidation or transfer. . . ." § 12.5, Excerpts of R. Vol. I, Tab 9, Bates No. 386. Clearly the merged plan can be a terminated one, and vice versa. Therefore, the plan terms do not bar a merger with PIUMPF.

Accordingly, the bankruptcy court did not err in finding that a merger with PIUMPF is an

alternative way to implement the business decision to terminate the plans. Crown does not dispute that the acts of implementing the termination procedure are subject to the scrutiny under ERISA's sections governing the plan administrator's fiduciary obligations.[10] Neither does Crown dispute the bankruptcy court's finding that "the officers and directors of Crown did not make the intensive and scrupulous investigation of the plan's investment options that the circumstances required particularly given their dual fiduciary capacity."[11] Tr. Hr'g, Dec. 11, 2001 (Excerpts of R., Vol. II, Tab 7, Bates No. 402) (internal quotations omitted). Therefore, the bankruptcy court was correct in holding that Crown's Directors, failing to consider the merger option seriously while acting as the plan administrator, breached the fiduciary duties under ERISA.

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[10] Crown states: "The fiduciary standard described in *Leigh v. Engle* is a standard applicable to plan administrators' actions, not plan sponsors' actions." Because the bankruptcy court is correct in finding that a merger with PIUMPF is an alternative method to implement the termination procedure, Crown's Directors acted as the plan administrator, rather than the plan sponsor. Therefore, the bankruptcy court's reliance on *Leigh*, 727 F.2d 123, is appropriate.

[11] It is immaterial that a termination by annuitization or a merger with PIUMPF can be characterized as "investment options." The bottom line is whether, how and for what purposes the pension plan assets have been used.

As a last resort, Crown argues that, even if the officers and directors breached their fiduciary duties, a constructive trust for the reversion is not a proper remedy. This argument is based on the assertions that Crown did not profit from the alleged wrongdoing or risk the trust assets. *Cf. Murdock*, 861 F.2d 1406 ("If ERISA fiduciaries breach their duties by risking trust assets for their own purposes, beneficiaries may recover the fiduciaries' profits made my misuse of the plan's assets."). However, the court is not persuaded that Murdock is only applicable to monetary profits made by fiduciaries with plan assets. Although the reversion would most likely inure to the benefit of Crown's administrative and priority creditors, it is also beneficial to Crown to discharge the fiduciary obligations owed to these creditors.[12] Further, the dispositive factor in Murdock was the self-serving purpose of using plan assets rather than the actual risk of such a use. *See id.* at 1414 ("In the case before us, the fiduciaries allegedly breached one of the duties to an employee benefit plan that lies at the core of ERISA-the duty of loyalty.") Contrary to Crown's interpretation, Waller also did not focus on the risks involved in choosing an unstable annuity provider. 32 F.3d 1337. Rather, the rationale underlying Waller was that the fiduciaries chose the lowest annuity bid in order to motivated by interests other than that of the plan participants and beneficiaries and used the plan assets for an annuity

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[12] This is exactly where the bankruptcy court found conflict of interests against the plan participants and beneficiaries. See *supra* note 4.

policy that generated the reversion for such interests.[13] Murdock and Waller applies. Accordingly, the constructive trust as ordered by the bankruptcy court is a proper remedy.

CONCLUSION

For the foregoing reasons, the court hereby AFFIRMS the preliminary injunction as issued by the bankruptcy court. The court further ORDERS that Pace International Union is DISMISSED from the present action.

IT IS SO ORDERED.

Date: January 10, 2003

MARILYN HALL PATEL

Chief Judge

United States District Court

Northern District of California

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[13] The appellees asserted some directors filed claims in the bankruptcy proceedings. First Am. Compl. Therefore, the self-interests may not only be in discharging the fiduciaries obligations to the creditors but also getting money back for these directors themselves.

IN RE: CROWN VANTAGE, CROWN PAPER, INC.
Debtors.

Case No. 00-41584 N; 00-41583 N

PACE INTERNATIONAL UNION,
Plaintiff

v.

CROWN VANTAGE, CROWN PAPER COMPANY, ET AL,
Defendants.

A. P. No. 01-4375 AN

United States Bankruptcy Court
Northern District of California
(Oakland Division)

TRANSCRIPT OF PROCEEDINGS
HEARING RE TRO, PRELIMINARY INJUNCTION
TELEPHONIC CONFERENCE

BEFORE THE HONORABLE RANDALL J. NEWSOME
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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PROCEEDINGS

December 11, 2001 3:01 p.m.

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THE COURT: Good evening, who do we have on the line?

MS. WARREN: Good evening. Judge, it's Mary Warren representing the Defendants in the Pace matter, and also Judith Germano of Shearman & Sterling is with me as well.

MR. RAISNER: Christian Raisner, Your Honor, for the Plaintiff and John Plotz, except for some reason the conferencing did not work.

THE COURT: Okay. Well, the first question, or the first issue I think I need to take up is as to the supplemental evidence that was submitted yesterday. Mr. Raisner, I'm not going to allow that in, first because it wasn't presented at the trial, but more importantly, I don't know that it's really relevant.

The second issue I want to take up, which I should have taken up some time ago but for some reason failed to mention, Rule 65(a)(2) of the Federal Rules of Civil Procedure which I believe are incorporated into 7065 of the Bankruptcy Rules allows the Court to consolidate the hearing on the preliminary injunction with the merits. I don't think there's any way that I could do that on my own at this point, but I wondered whether or not the parties would stipulate to that.

MS. WARREN: We would stipulate, Your Honor.

MR. RAISNER: Well, Your Honor, we believe that there may be issues as to the merits that we would need to discover further facts. So if we were dealing with all of the merits, I guess I would certainly have to consult more specifically before I stipulated to that.

THE COURT: Well, as to the entitlement to a preliminary injunction, at any rate, rather than --

MR. RAISNER: Certainly as to the entitlement to a preliminary injunction for those purposes, we're willing to stipulate.

THE COURT: To this being also consolidated on the merits of the substantive issue; is that right?

Well, look, I sprung this on you, and it's probably not fair for me to require that. Why don't I just issue the decision that I have here and then you can decide what, if anything, you should do going forward. So I will do that unless anyone has anything else to say at this point.

(No response.)

All right. Then I'll proceed.

This Chapter 11 adversary proceeding is before the Court upon the Plaintiff's motion for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure as incorporated into Bankruptcy Rule 7065. The Plaintiff's complaint alleges, among other things, that the Defendants committed breaches of their fiduciary duties in terminating certain company pension plans.

The facts surrounding these claims are as follows:

Crown Vantage, Inc. is the parent company of Crown Paper, Inc., a specialty paper company spun off from James River Paper in 1995 when James River merged with Fort Howard Paper to become

Fort James. Subsequently, Fort James was acquired by Georgia Pacific.

Crown employed some twenty-six hundred people and operated seven paper mills in the Eastern United States. As a result of weak market prices for paper and over-leveraging of its aged assets, Crown began losing money almost immediately after the spin-off and continued to lose money thereafter.

Crown Vantage and Crown Paper filed Chapter 11 petitions on March 15, 2000. Finding it impossible to reorganize as a going concern due to unmitigated losses, the Debtors embarked upon a piecemeal liquidation of their assets. At least by the time the last of the paper mills was sold in June of 2001 and probably long before then, it was clear to everyone involved in the case that the sale proceeds would not come close to paying the secured and unsecured liabilities of these companies. Indeed, the companies' secured lenders were under secured by tens of millions of dollars.

Even after agreeing to relinquish as much as 21 million dollars towards winding up the Debtors' affairs through a liquidating Chapter 11 Plan, it is unclear whether there will be sufficient funds to pay the administrative expense claimants. It is almost a certainty that the unsecured creditors in these cases will receive nothing unless the Debtors' fraudulent transfer lawsuit against their former parent is successful.

With cash running out and secured lenders unwilling to release any further funds, absent the confirmation of a Chapter 11 Plan, the pressure was on to wind down the company's remaining operations and move towards plan confirmation. There was particular urgency in addressing the termination of Crown's 18 pension plans, 17 of which were for hourly rate employees and the remaining one for salaried employees.

Members of Crown's Board of Directors were also the trustees for these pension plans. The Pension Benefit Guarantee Corporation had filed Proofs of Claim totaling in the millions for any funding liability they would be forced to assume if they took over any of these plans. These Proofs of Claim potentially posed a stumbling block to plan confirmation.

As of June 2001, it was unclear whether some or all of the plans were susceptible to what is known as a standard termination; i.e., when plan assets are sufficient to meet plan liabilities through the purchase of an annuity. In July of 2001, Crown engaged Dietrich (Phonetic) & Associates to act as their agent to obtain quotes from insurance companies for the purchase of such an annuity. Dietrich is only one of a handful of firms in the country which performs this service.

According to Robert Schaefer, (Phonetic) president of Dietrich, the sole purpose of his firm's retention was to seek out an annuity agreement. See Plaintiff's Exhibit 7. It was his understanding as of his firm's retention on July 23, 2001 that

Crown had definitely decided to pursue this avenue for terminating the plans. Dietrich's services were to paid by the insurance company from which Crown purchased the annuity. Had Crown's intention been otherwise than to purchase an annuity, Schaefer would have structured his retention agreement differently.

Some time during the summer of 2001, the possibility was raised that 17 Crown Union plans might be merged into the Pace Industrial Union Management Pension Fund or PIUMPF, a Taft Hartley Multi-Employer Pension Fund for members of Pace International Union. At that time, both Pace and Crown viewed such a merger as advantageous. At that point, it wasn't at all clear to Crown that the plans had adequate assets to allow standard termination. From the Union's standpoint, the merger held out the prospect that retirees might receive more than the minimum benefits under the plans since PIUMPF had occasionally in the past paid pensioners a thirteenth monthly check during the year.

The plans also contain an established dispute resolution program which employees could resort to if problems arose. On August 15th, 2001, Fredrick Sosnick and Robert Cicero of Shearmn & Sterling, Debtors' counsel, Evan Davis, General Counsel of Crown, and Robert E. Smith, vice-president of Pace Region Four met in Richmond Virginia to discuss the possibility of such a merger.

The Crown representatives expressed only two concerns. They wanted to be assured of the financial

soundness of PIUMPF and that such a merger was legally possible. The parties agreed that their attorneys and actuaries would further investigate the merger. For a variety of reasons, there was some delay in exchanging the required information and in putting together a merger proposal. But on September 26th 2001, the Segal (Phonetic) companies, PIUMPF's actuary, reported that a merger of the Union plans in question was feasible.

Although Crown asserts that the merger with PIUMPF was never feasible because PIUMPF was not financially sound, there is insufficient evidence in the record to support this assertion. PIUMPF's 2001 report lists unfunded actuarial accrued liabilities of $239,140,452, but Virginia McGinley (Phonetic), vice-president of Segal Company and signing actuary for PIUMPF testified that the plan was well funded and exceeded the minimum requirements by law.

Lawrence Reed (Phonetic) of Watson Wyatt, actuaries for Crown, testified that there was no one correct method for determining the financial soundness of the fund and that it did not have, sufficient information to state that PIUMPF was under funded. On September 26th, Robert Cicero wrote to Sleavin & Hart (Phonetic), PIUMPF's lawyers, requesting, quote:'

> "... additional information to complete its diligence review."

End quote. Plaintiff's Exhibit 23.

That same day, Crown's Board of Directors met and reviewed preliminary bids for annuitizing the plans. Those bids were submitted to the company on or about August the 30th. According to Board member, Donna Weaver, it was then that the Board first learned that the Union plans, although not the salaried workers plans, could be annuitized. The circumstances strongly suggest and the Court hereby finds that it was at this meeting, if not sooner, that the Board also learned that an annuitization of the plans might well result in Crown receiving a reversion from the plans.

The minutes from that meeting read as follows:

> The Union has offered to take all of the hourly pension plans into PIUMPF, the Union Multi-employer Plan. This offer will be evaluated in comparison to the annuitization of plans when we receive final bids from the annuity providers. The final bids are anticipated on October 9th, 2001." Plaintiff's Exhibit 9.

On October 1, 2001, Sleavin & Hart sent Robert Cicero a draft of a proposed merger agreement. Plaintiff's Exhibit 25. On October 4, 2001, the Court conducted a hearing on approval of Crown's disclosure statement. At that hearing, Mr. John Plotz representing Pace raised concerns about the lack of detail in the Disclosure Statement regarding the termination of the pension plans.

Noting that the matter was in flux, Mr. Sosnick responded that, quote:

> "One of the things we're looking to do is not in fact terminate the plans which may have some adverse consequences to the participants, but to try to merge them into the Union plan which we think would benefit them."

End quote. Transcript, October 4th hearing, page 14.

At the Court's suggestion, the parties then agreed that the Disclosure Statement should be amended to state that Crown, quote:

> "...must comply with the Bankruptcy Code, the provisions of the pension plan, all other applicable Federal and State law, subject to determination for compliance purposes of the Bankruptcy Court."

End quote. Transcript October 4th hearing, page 15.

On October 8th, Hart & Sleavin sent Cicero the documents he requested on September the 26th. On October the 9th, the Crown Board of Directors met again. According to Ms. Weaver, at that point, the Board was on a 45-day timetable to dissolve the company which was down to its last $10,000 or less in the bank.

The Board was presented with final bids from Fohr & Schirs (Phonetic). Either at that meeting or some time before, the Board was informed that the final bids would expire within 24 hours requiring Board action that afternoon. The Board chose a bid

from Hartford Life Insurance Company to annuitize 12 of the Union plans. The other five plans would remain the responsibility of Georgia Pacific pursuant to prior agreement.

The stated reasons for choosing Hartford were because of the price and soundness of the company's capital surplus ratio. The Hartford bid also offered a $4,898,000 reversion to Crown, the highest reversion amount of the four bids deemed acceptable by Dietrich and the Board.

The next day Crown signed an agreement to deposit over 84 million dollars in plan assets with Hartford. Under the terms of the agreement, a substantial penalty estimated by Mr. Schaefer as being four million dollars would be incurred if Crown attempted to withdraw from this agreement. Thus, as of October the 10th, the annuitization of pension plans was a fait accompli, notwithstanding the assurances of notice and Court approval made by counsel for Crown to the Court and counsel for the Union at the October 4th hearing.

There is no evidence that the Board of Directors at the October 9th meeting ever sought a waiver of the 24-hour deadline for accepting Hartford's bid. There is no evidence that the Board of Directors at the October 9th meeting or prior thereto was ever presented with any of the documents pertaining to the PIUMPF merger. They received no comparisons weighing the risks and the benefits between the PIUMPF mercer and annuitization. No one ever asked their own actuary, Mr. Reed, to conduct an analysis of the PIUMPF offer.

Although Ms. Weaver said there were many issues surrounding the PIUMPF merger that were unresolved, she admitted that she never saw the PIUMPF draft merger agreement and did not specify what issues remained, other than the lack of a clear closing date for the merger. Indeed, she testified that the merger was never an acceptable alternative to annuitization in a weak industry.

Another issue cited in the October 9th Board minutes was that the PBGC had agreed to release Crown under an annuitization but not in a merger. There's no evidence that Crown or its lawyers ever actively pursued a release from PBGC as to a merger with PIUMPF. And then it's also stated with regard to the merger that, quote:

> "PBGC has express reservation at this course of action."

End quote. However, Mr. John DeFranco, an attorney with the PBGC, who worked on Crown's pension termination, testified that he never stated any reservations or concerns about a merger.

Based upon all the evidence, the Court concludes that as of no later than September the 26th, 2001, and perhaps as early as August the 30th when preliminary annuity bids were submitted, the officers and directors of Crown had determined to annuitize the pension plans and gave no serious consideration to the PIUMPF merger proposal.

The standard for granting a preliminary injunction in the Ninth Circuit is well settled. The

moving party must show either one, the likelihood of success on the merits and the possibility of irreparable injury or two, the existence of serious questions going to the merits and the balance of hardships tipping in movant's favor. Gilder, G-i-l-d-e-r versus PGA Tour, Inc. 936 F.2d 417, 422, Ninth Circuit (1991).

The law regarding the standards of conduct for fiduciaries under ERISA is also well settled. Pension plan trustees', quote:

> "...decisions must be made with an eye (single) to the interest of the participants and beneficiaries."

End quote. Donovan versus, (that's D-o-n-v-a-n) versus Bierwirth, B-i-e-r-w-i-r-t-h, 680 F.2d 263, 271, Second Circuilt (1982), quoted in Pilkington PLC, (that's P-i-l-k-i-n-g-t-o-n) PLC versus Perelman, (P-e-r-e-l-m-a-n) 73 F.3d 1396, Ninth Circuit (1995).

This is particularly difficult but particularly important when the trustees of a plan serve in a dual fiduciary capacity. Although it is frequently the case that plan trustees have dual loyalties and nothing in ERISA prohibits a trustee from having conflicting fiduciary roles, (See Fren (Phonetic) versus Sanwa Bank, California 35 F.3d 466, 467 Ninth Circuit 1994), quote:

> "It may be virtually impossible for fiduciaries to discharge their duties with an eye to the interest of the beneficiaries and the fiduciaries may need to step aside, at

> least temporarily, from the management of assets where they face potentially conflicting interests."

End quote. Lay versus Engle (Phonetic) 727 F.2d 113, 125, Seventh Circuit (1984) quoted in Pilkington PLC versus Perelman, 72 F.3d 1396, 1401, Ninth Circuit (1995).

As the court noted in Lay versus Engle, quote:

> "Whether fiduciaries with devoted loyalties make an intensive and scrupulous investigation of the plans and investment options may be highly probative of the fiduciaries' loyalties."

End quote. 726 F.2d at 126, quoted in Pilkington PLC, 72 F.3d at 1401.

Based upon all the evidence presented, I find that there are serious questions whether the conduct of Crown's officers and Board of Directors was directed more at fulfilling their fiduciary obligations to the creditors of an insolvent corporation than at fulfilling their fiduciary obligations to the corporation's pensioners.

Whether motivated by the prospect of a reversion, which Mr. Evans admitted was at least a minor motivating factor in choosing to annuitize the plans, or the desperate financial circumstances of Crown by October of 2001, or the need to obtaining a confirmed plan and a wind-up of the company, or the certainty that Crown would receive a release from

the PBGC if the annuitization route were chosen, or all of the above, the evidence strongly suggests that the officers and directors of Crown did not make the, quote, "intensive and scrupulous investigation of the plan's investment options," end quote, that the circumstances required particularly given their dual fiduciary capacity.

Indeed the sequence of events described above raises a serious question whether the investigation into the PIUMPF merger was a ruse from the outset designed to lead the Union into believing that a merger was under serious consideration without any intention of ever really considering a merger option if an annuitization was possible.

Had there been no prospect of a merger with another plan, then the Board's course of conduct in choosing Hartford almost surely would have passed muster. But once the merger option was raised, the Board had a fiduciary duty to fully explore it and determine which option was truly in the beneficiaries' best interests. The fact that the company was out of cash and had a timetable for plan confirmation should have played no part in that determination.

Crown insists that plan termination is a business decision and thus Crown owed no fiduciary obligation to the pensioners in terminating the plans. Although the decision to terminate a plan is a business decision, both ERISA and the case law impose fiduciary responsibilities as to discretionary actions taken to implement that decision. Waller versus Blue Cross of California, 32 F.3d 1337, 1342,

Ninth Circuit (1994). See 29 USC Section 1002(21)(a).

The decision whether to annuitize the plans or merge them into PIUMPF was such a discretionary act. Crown also insists that since the beneficiaries will receive all the monetary benefit they are entitled to under the Hartford annuity, there is no injury and thus no grounds for an injunction. But, quote:

> "ERISA expressly prohibits the use of assets for purposes other than the best interests of the beneficiaries and the language of Section 1109(a) providing for disgorgement of profits from improper use of trust assets is the appropriate remedy."

End quote. Lay versus Engle, 727 F.2d 113, 122.

Thus, although the beneficiaries may not lose financially as a result of Crown's decision to annuitize, Crown should not be entitled to profit from its fiduciary oversight in failing to make a thorough investigation into the PIUMPF merger. In the context of Rule 65 of the Federal Rules of Civil Procedure, as between the creditor body of Crown and the beneficiaries of the pension funds, the balance of hardships tips sharply in favor of the beneficiaries.

Accordingly, for the reasons stated, the motion for a preliminary injunction is granted. It would serve no one's purpose at this point to attempt to unwind the Hartford transaction and risk a lawsuit

and the potential loss of four million dollars. However, the Defendants are directed to place any reversion paid by Hartford into an interest-bearing account pending a final decision on this matter.

The parties are directed to investigate and report back to the Court within 30 days on the feasibility of investing this reversion into one or more Crown Employee Benefit Plans.

It is so ordered.

Does anyone have any questions? To the extent that Rule 65 requires findings of fact and conclusions of law, those are my findings and conclusions as stated into the record in accordance with Rule 52 and 7052 of the Bankruptcy Rules. And if you would like a copy of the findings and conclusions, you may order a copy of the transcript.

MR. RAISNER: Your Honor, Christian Raisner on behalf of -- (inaudible.)

THE COURT: I did not -- we did not pick up your remarks, Mr. Raisner. I'm sorry.

MR. RAISNER: I'm sorry. Let me try again. Can you hear me now?

THE COURT: Yes, I can.

MR. RAISNER: Yes. As to the question previously asked, whether the parties would stipulate to the extent that a consolidation with the merits was required, on behalf of the Plaintiffs, we would stipulate.

THE COURT: Well, I'll ask the company again, are you willing to stipulate?

MS. WARREN: Well, Your Honor, I think you asked that question before you issued your ruling -

THE COURT: Yes, I did.

MS. WARREN: -- for a reason, and now that we have your ruling, we need to think about the consequences of it.

THE COURT: Okay. That's fair enough.

MS. WARREN: I do have one question, Your Honor -- well, I have two. First of all, you'd like a report back from us 30 days from today about annuitizing versus a merger with PIUMPF?

THE COURT: No. No, ma'am. I'm sorry if I didn't make myself clear. I'd like a report back in 30 days regarding the possibility of somehow taking the -- whatever the reversion is and investing that reversion in some manner of fashion in some employee -- Union Employee Benefit Plans, not -- at this point, the merger with PIUMPF, unless that's possible as well, and I don't know whether it is, but as far as I'm concerned, the annuitization of the pension plans is done. I'm not going to -- the injunction doesn't address that, and I think I specifically indicated that I'm not going to try to unwind that.

MR. RAISNER: Your Honor, Christian Raisner. May I inquire so that there not be any confusion as

to the meaning of the terms. The amount of the reversion that we're seeking might be an issue. I just want to make sure that we're talking about the same amount. We understand the amount at issue to be anything remaining after the purchase of the annuity, and what was reported was -- I believe it was 4.8 million approximately.

THE COURT: Almost 4.9 and -

MR. RAISNER: Okay.

THE COURT: -- my understanding -- that's why I don't want anything more than a report in 30 days. It may not -- it may take longer than 30 days because I'm not going to make the company saddle any taxes from the reversion. There was mention in the hearing -- and we didn't take get into details -- but if there are taxes that are due and owing on this reversion, I'm not going to make the company pay those out of their own meager assets. They'll come out of this reversionary fund. So basically, we would be talking about whatever is left after any taxes are paid, if there are any.

MR. RAISNER: If -- I believe, Your Honor, there may be a serious question. There may not be the same tax. I believe the tax would apply if there is a reversion to the company. It may not apply at all.

THE COURT: Well, that may very well be, but I don't -- I don't know enough at this point to even get into that and I'm certainly not going to try to at this point.

MS. WARREN: Yes, Your Honor, we can make that part of a report. There is a tax that would apply, and we can set forth our understanding of it, and if the Plaintiffs have different information, they can get that to you too.

THE COURT: That's fine.

MS. WARREN: But we can make that part of our report.

THE COURT: Okay. That's fine.

MR. RAISNER: Your Honor?

THE COURT: Yes.

MR. RAISNER: Your Honor, If I may make one request, and I believe that it will be no problem, but I'd like to request it on the record that any information necessary will be freely shared on request during this 30-day period, so that while we're preparing these reports or -

THE COURT: Well, I would assume that that's the case. I would hope that there's not going to be any of the contentiousness -- although it wasn't terribly contentious -- but there was some contentiousness that attended the pre-trial period as to this particular motion. And I would hope that the parties can just cooperate and get this done. So I don't anticipate that being a problem. I hope not.

MS. WARREN: That's fine, Your Honor. We don't lave any problem with that.

THE COURT: Okay. Anything further? Do you want an expedited copy of the transcript?

MS. WARREN: Yes, please.

THE COURT: All right. Then we'll order -- I will order one and we'll get two copies made, and I will leave it to Ms. Passadore to make sure that that gets done and sent to you. All right.

MS. WARREN: All right. Your Honor, would you like a written report in 30 days?

THE COURT: Yes, I would.

MS. WARREN: Okay. We'll submit that and of course we'll have to consult with our creditors and so on as part of this --

THE COURT: Okay.

MS. WARREN: -- and we'll try to do that as promptly as possible.

THE COURT: Very well.

MR. RAISNER: Your Honor, I do understand that both sides are to make --

THE COURT: Well, both sides can make one if they want to. I anticipate that -- I anticipated one report that would be a collaborative effort, but if you both want to make a report, that's fine.

MR. RAISNER: I would suggest that we could certainly attempt to collaborate. I would like to try that.

THE COURT: Okay. And then -

MR. RAISNER: But I just want to make sure that my clients have the ability to --

THE COURT: You can both submit a report. You can submit a joint report. It doesn't matter to me. Just give me a report in 30 days, okay?

MR. RAISNER: Very well.

THE COURT: All right.

MS. WARREN: That's fine.

THE COURT: Thank you.

MR. RAISNER: Thank you.

MS. WARREN: Thank you, Your Honor.

THE COURT: Off the record. Thank you very much.

(Whereupon, the proceeding are concluded at 3:28 p.m.)

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a correct transcript from the digital sound recording of the proceedings in the above-entitled matter.

DATED: December 14, 2001

By: /s/

Jo McCall

IN RE: CROWN VANTAGE, INC.
Debtor.
Employer I.D. # 54-1752384

PACE INTERNATIONAL UNION, ET AL,
Plaintiffs

v.

CROWN VANTAGE, INC., ET AL,
Defendants.

Case No. 00-41584 N
A. P. No. 01-4375 AN

United States Bankruptcy Court
Northern District of California
Oakland Division

[JOINT PROPOSED] ORDER ON MOTION FOR PRELIMINARY INJUNCTION

The plaintiffs' motion for preliminary injunction having been granted on December 11, 2001, the Court's Findings and Conclusions as stated in the attached transcript are fully incorporated in this Order, and now additionally clarified as follows.

All cash assets remaining in the pension plan as of the date hereof, and any interest subsequently earned thereon (the "Cash Assets"), shall remain in the pension trust, invested in a money market fund

or other suitable interest bearing investment(s). No reversion or other payment of such Cash Assets to the Defendants shall occur, pending a decision by this Court on the allocation of those Cash Assets remaining after the discharge of all liabilities and obligations of the pension plan (the "Surplus"). Any adjustments made to the Cash Assets in the course of discharging such liabilities and obligations shall be referred to collectively as the "Required Adjustments." Nothing in this Order shall be read to prohibit or otherwise delay: (i) except as set forth in the preceding sentence, the termination of the pension plan in accordance with Section 4041(b) of ERISA, including, without limitation, the distribution of plan assets to satisfy benefit liabilities; (ii) the payment of administrative expenses from plan assets as they become due; or (iii) the continued administration of the pension plan and its termination in accordance with the terms of the plan or as requited by applicable law; provided, however, that any expense charged to the pension plan shall be in accordance with the guidelines issued by the U.S. Department of Labor, including, without limitation, DOL Advisory Opinion 2001-01A; and provided, further, however, that the Defendants shall not charge to the pension plan any legal costs or expenses incurred in the defense of this adversary proceeding, or incurred by Crown Vantage Inc. in its settler decision as plan sponsor of the pension plan to purchase the annuity from the Hartford Life Insurance Company instead of pursuing a merger of the pension plan into PIUMFF. No plan assets shall be distributed, transferred, paid or otherwise removed from the pension trust, except as set forth

in (i) – (iii), above, without reasonable notice to the Plaintiffs' counsel, and the Defendants shall provide the Plaintiffs' counsel with detailed information about the nature and amount of such distribution, transfer, payment or removal, as soon as practicable.

The parties shall submit to the Court their report on the feasibility of applying the Surplus for the benefit of the pension plan participants. The Plaintiffs shall submit a report to the Defendants on January 10, 2002 and the patties shall confer and attempt to agree on a joint report to be made by February 4, 2002.

Good cause appearing, IT IS SO ORDERED.

Dated: February 5, 2002

/s/
United States Bankruptcy Judge

IN RE: CROWN VANTAGE, INC.
Debtor.
Employer I.D. # 54-1752384

PACE INTERNATIONAL UNION, ET AL,
Plaintiffs

v.

CROWN VANTAGE, INC., ET AL,
Defendants.

Case No. 00-41584 N
A. P. No. 01-4375 AN

United States Bankruptcy Court
Northern District of California
Oakland Division

PARTIES' JOINT REPORT PURSUANT TO COURT'S DECEMBER 11, 2001 ORDER

TO THE HONORABLE RANDALL J. NEWSOME, UNITED STATES BANKRUPTCY JUDGE:

Pursuant to this Court's order dated December 11, 2001, as modified pursuant to this Court's ruling on January 7, 2002, and by agreement of the parties dated February 4, 2002 and attached hereto as Exhibit A (as modified, the "December 11 Order"), the parties respectfully report as follows:

RECITAL OF FACTS

Crown Vantage Inc. was the plan sponsor and plan administrator of, among others, twelve hourly employee pensions plans that have been merged together into one pension plan (the "Merged Plan").[1] The Merged Plan has been terminated, effective as of December 31, 2001. On October 11, 2001, Crown purchased an annuity (the "Annuity") from the Hartford Life Insurance Company, to satisfy certain benefit liabilities and effect a standard termination of the Merged Plan, in accordance with Section 4041(b) of ERISA. As of October 11, the Merged Plan had assets of approximately $89 million. The premium for the Annuity was approximately $84 million, and, therefore, after the payment of the Annuity premium, approximately $5 million in cash remained in the Merged Plan.

On November 15, 2001, the plaintiffs brought the above-captioned proceeding against the defendants. On December 11, 2001, the Court made Findings of Fact and Conclusions of Law, which, by oral stipulation of the parties, became final. Pursuant to the December 11 Order, the defendants are required to retain all Cash Assets in the Merged Plan, less any Required Adjustments, pending a decision by this Court on the allocation of the Surplus. In the December 11 Order, the Court also

---

[1] Except where otherwise indicated, all capitalized terms are defined as set forth in December 11 Order, the terms of which are incorporated herein by reference, in their entirety.

directed the parties to report to the Court regarding how the Surplus could be distributed exclusively for the benefit of the participants of the Merged Plan.

JOINT REPORT REGARDING DISTRIBUTION OF THE SURPLUS

As required by the December 11 Order, the plaintiffs and defendants make this joint report (the "Joint Report") to the Court, suggesting how the Surplus could be distributed exclusively for the benefit of the participants of the Merged Plan. The Surplus could be distributed as follows:

A. The defendants shall make all Required Adjustments as soon as reasonably practicable after the date that this Joint Report is "So Ordered" by the Court (the "So Ordered" Joint Report, referred to as the "Joint Report and Order"), but in no event later than required by the terms of the Merged Plan or applicable law.

B. After all required Adjustments have been made, the defendants shall:

1. With respect to that amount of the Surplus attributable to employee contributions made by participants during their working lives, amend the Merged Plan to provide for the equitable distribution of such amount to the participants who made such contributions, or their beneficiaries. While the parties agree that this distribution is not required pursuant to Section 4044(d)(3) of ERISA, the amount to be so

distributed shall be calculated in accordance with the provisions of Section 4044(d)(3), as if the entire Surplus was to revert to the defendants; and

2. Amend the Merged Plan to provide for the distribution of the remaining Surplus, if any, to all retirees and terminated vested participants who (i) terminated employment with Crown Vantage Inc. on or after August 22, 1995, and surviving spouses of such retirees and terminated vested participants, and (ii) continue to have an accrued benefit under the Merged Plan as of December 31, 2001. This benefit shall be distributable in the form of an immediate cash lump sum, and for each recipient, shall be equal to the percentage of the remaining Surplus represented by the fraction (a) divided by (b), where (a) equal that recipient's credited service (or, in the case of a surviving spouse, the credited service of the relevant deceased participant) under the Merged Plan (determined, in the case of each participant, under the service credit rules of the Merged Plan applicable to such participant for purposes of calculating such participant's accrued benefit under the Merged Plan), and (b) equals the sum of such service for all such recipients and deceased participants.

C. The parties agree that in no event shall the sum of, (i) the aggregate amount of the distribution calculated in accordance with paragraph B, subsection 1, above, and (ii) the aggregate amount of

the benefit calculated in accordance with paragraph B, subsection 2, above, exceed the amount of the Surplus.

DISPUTED ISSUES

In addition to the terms above, to which the parties agree, the defendants seek an order that there shall be no distribution of the Surplus, and no amendment made to the Merged Plan, to effect the foregoing, prior to the exhaustion or waiver by any defendant, creditor, or other party-in-interest, of any right such person or entity may have to appeal or otherwise challenge the Court's December 11 Order, this Joint Report and Order, or any other ruling of this Court in the above-captioned proceeding. Plaintiffs do not agree to this request.

Moreover, plaintiffs seek an order providing that PACE, rather than the plan administrator, shall provide the requisite notice of these additional benefits to the recipients. Defendants do not agree to this request.

Respectfully submitted,
Dated this 4th day of February, 2002

/s/
Van Bourg, Weinberg, Roger & Rosenfeld
By Christian L. Raisner
Attorneys for Plaintiffs

Respectfully submitted,
Dated this ___ day of February, 2002

/s/
Shearman & Sterling
By Mary Warren
Attorneys for Defendants

ORDER

Good cause appearing, IT IS SO ORDERED. The Preliminary Injunction shall remain in effect until this ORDER is fully effectuated.

Dated: February 5, 2002
By: /s/
Judge of the United States Bankruptcy Court

JEFFREY H. BECK,
LIQUIDATING TRUSTEE OF THE ESTATES OF
CROWN VANTAGE, INC. AND CROWN PAPER COMPANY,
Appellant,

v.

PACE INTERNATIONAL UNION,
ON BEHALF OF MEMBER AND FORMER MEMBER
PARTICIPANTS IN PENSION PLANS SPONSORED BY THE
DEBTORS; ET AL.
Appellees

Nos. 03-15303, 03-15331
D.C. Nos. CV-02-01407-MHP
01-4375N
Northern District of California, San Francisco

United States Court of Appeals
for the Ninth Circuit

ORDER

Before: REINHARDT, PAEZ, and BERZON, Circuit Judges.

The panel has voted unanimously to deny the Petition for Rehearing and the Petition for Rehearing En Banc.

The full court has been advised of Appellant's Petition for Rehearing En Banc, and no active judge of the court has requested a vote on whether to rehear the case en banc. Fed. R. App. P. 35(b).

Therefore, the Petition for Rehearing and the Petition for Rehearing En Banc are DENIED.

FILED

Jan 10 2006

Cathy A. Catterson, Clerk
U.S. Court of Appeals

(2)

No. 05-1448

FILED
JUN 12 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JEFFREY H. BECK,
Liquidating Trustee of the Estates of
Crown Vantage, Inc. and Crown Paper Company,
Petitioner,

v.

PACE INTERNATIONAL UNION,
EDWARD J. MILLER and JEFFREY D. MACEK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

CHRISTIAN L. RAISNER *
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* Counsel of Record

Attorneys for Respondents

June 12, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

COUNTERSTATEMENT OF QUESTIONS PRESENTED

An employer with conflicting interests as sponsor, trustee and administrator of its employees' pension plans may decide to terminate the plans. The questions presented are:

1. Whether the employer owes a fiduciary duty under ERISA to consider all options available for providing benefit liabilities in terminating the plans.

2. Whether merger into a multiemployer pension plan is a method of providing benefit liabilities in terminating a single-employer plan under ERISA.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Respondent PACE International Union recently merged with USW, AFL-CIO. PACE and USW were and are unincorporated associations.

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IN THE

Supreme Court of the United States

No. 05-1448

JEFFREY H. BECK,
Liquidating Trustee of the Estates of
Crown Vantage, Inc. and Crown Paper Company,
Petitioner,

v.

PACE INTERNATIONAL UNION,
EDWARD J. MILLER and JEFFREY D. MACEK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

STATUTES AND REGULATIONS

Respondents accept the statutes and regulations listed by petitioner, but add a fuller selection from 29 U.S.C. § 1412:

> (a) A transfer of assets or liabilities between, or a merger of, a multiemployer plan and a single-employer plan shall satisfy the requirements of this section.
>
> (b) No accrued benefit of a participant or beneficiary may be lower immediately after the effective date of a transfer or merger described in subsection (a) than the benefit immediately before that date.

STATEMENT OF THE CASE

The narrative in the Bankruptcy Court's judgment is accurate. Respondents hereby incorporate it. App. 54-62.

However, respondents offer this abbreviated account to correct misstatements in petitioner's *Statement of the Case*, particularly the third paragraph on page 7.

In the summer of 2001, Crown Vantage, Inc., was preparing a Chapter 11 bankruptcy liquidation plan. The Directors of Crown Vantage, Inc., were also the trustees of seventeen pension plans covering hourly employees. The trustees were both the sponsor and the administrator of the plans. Because Crown was winding up its affairs in preparation for its own demise, its pension plans had to be wound up, too.

Crown was considering the purchase of an annuity to provide plan benefits to the participants. The employees' bargaining representative, PACE International Union, offered to fold all seventeen plans—some overfunded, some underfunded—into its Taft-Hartley plan, the PACE Industry Union-Management Pension Fund (PIUMPF). Crown promised to consider that option. "[PIUMPF's] offer will be evaluated in comparison to the annuitization of plans when we receive final bids from the annuity providers," say the Board minutes of September 26, 2001. SER 3.

On October 4, 2001, during bankruptcy proceedings, Crown promised in open court that it would not take final action on the pension plans without informing the court and PACE, so that PACE would have an opportunity to be heard. SER 1, 15:14-16:8.

On October 10, however, without notice to the court or union, Crown committed $84 million to Hartford Life Insurance Company to provide an annuity covering twelve of the pension plans. Crown abandoned five underfunded plans. After the premium was paid, nearly $5 million remained in

the twelve plans, which Crown intended to take as a "reversion." Petitioner states at page 7:

> Based on a variety of advantages provided by termination through annuitization, including but not limited to the financial security of the annuity, Crown's board approved and immediately consummated the purchase of an $84 million annuity from Hartford Life Insurance Company. . . In opting to terminate the plan by purchase of the Hartford annuity, the Crown Board did not accept PACE's alternative merger proposal.

To the extent this paragraph implies that Crown *compared* merger with annuitization, it is contrary to the evidence and the findings of the courts below. Hartford's financial stability was not an "advantage" over PIUMPF, since PIUMPF was also financially stable. PIUMPF supplied Crown with all requested financial information, but Crown never looked at it, or had it evaluated by an expert. The Bankruptcy Court found that Crown "gave no serious consideration to the PIUMPF merger proposal"—a finding that is amply supported by the record. App. 62.

One true advantage of merger was that PIUMPF formally proposed that "*All* of the liabilities of the Crown Vantage Plans shall become the liabilities of the PACE Fund." (SER 10, page 4, emphasis added.) The Petition's *Statement of Facts* implies that the Hartford annuity would also have provided "all benefit liabilities under the plan," as required by 29 U.S.C. § 1341(b)(3)(A)(i). That implication is not supported by the record and is contrary to fact.

The Bankruptcy Court held a full-day hearing on November 29, 2001. On December 11, 2001, the Court found that Crown had breached its fiduciary duties to the participants by failing to make an adequate investigation of its options. App. 64-67. The court therefore imposed a constructive trust on the reversion for the benefit of participants. App. 77-83.

Both the District Court and the Ninth Circuit affirmed the finding of a fiduciary breach under ERISA. As the administrator implementing a termination, Crown owed a duty of undivided loyalty to participants. Crown was obliged to keep "an eye single to the interests of the participants." At the same time, Crown owed a conflicting duty to its creditors to maximize assets in the bankruptcy estate. The District Court and the Ninth Circuit correctly applied the universally accepted rule of *Donovan v. Bierwirth*, 680 F.2d 263 (2nd Cir. 1982), *cert. den.*, 459 U.S. 1059. *Bierwirth* requires conflicted trustees to make a scrupulous and impartial investigation of their options. On appeal, Crown never challenged the finding that it failed to make such an investigation.

The case has been remanded to the Bankruptcy Court. Further proceedings are pending there, including respondents' motion for leave to amend the complaint.

REASONS FOR DENYING PETITION

Respondents respectfully suggest there are no compelling reasons to grant this petition for writ of certiorari.

The situation presented here is uncommon and of no great national importance: An employer, simultaneously wearing the hats of sponsor and plan administrator, is faced with a choice between purchase of an annuity and merger with another pension plan in the course of plan termination. A careful search of published decisions, legislative history, and scholarly works shows no discussion of a case with similar facts, except for a series of PBGC *Opinion Letters*, which favor the respondents, not the petitioner. This suggests that the scenario is rare.

The Ninth Circuit's decision is not "in conflict with the decision of another United States court of appeals on the same important matter." Rule 10(a). Nor is the decision in conflict with administrative regulations.

The Ninth Circuit decision is an excellent application of settled law and should not be disturbed. But if the Ninth Circuit erred in interpreting the statute or regulations, the error can be easily and appropriately corrected through Congressional action or the administrative rulemaking process.

I. TRUSTEES ACTING WITH CONFLICTED INTERESTS OWE A FIDUCIARY DUTY TO PARTICIPANTS TO MAKE AN IMPARTIAL INVESTIGATION OF ALL AVAILABLE OPTIONS

The decision to terminate a pension plan is generally a sponsor function carrying no fiduciary duty. But ERISA places the duty of carrying out the termination with the plan administrator. 29 U.S.C. § 1341. Fiduciary duties apply. *Waller v. Blue Cross of California*, 32 F.3d 1337, 1343 (9th Cir. 1994). As part of the termination process, the administrator must make a "final distribution" of the plan assets. The administrator must either purchase an annuity from an insurance company or "otherwise fully provide all benefit liabilities." 29 U.S.C. § 1341(b)(3)(A)(ii). In this case, the Ninth Circuit held that, in terminating a pension plan, one permissible method of "fully providing all benefit liabilities" is merger into another plan, as ERISA permits at 29 U.S.C. § 1412. Therefore the administrator was obliged to consider that possibility.

Crown Vantage, Inc., was both sponsor and administrator of its employees' pension plans. Its Board of Directors met several times to consider how to wind up the plans, including the options of annuitization or merger. Board minutes show no distinction between sponsor and administrator functions. SER 2-4. The same confusion, whether willful or naïve, was demonstrated by individual trustees. Board member and defendant Donna Weaver testified:

> But the board itself is—it's the same. In other words, we—I don't see the distinction. We have never—you

> know, that's not something we've done in these meetings traditionally, is say, "Okay, this half hour, we're wearing this hat."

ER 2, 253:4-8.

Not only were defendants wearing two hats—but the hats were, so to speak, tilted in opposite directions. As plan sponsor, the Board of Directors had an interest in maximizing the money it could make from any source, including a reversion. As plan administrator, however, its sole interest was required to be that of the participants and beneficiaries. These interests conflicted with each other.

The courts have already faced and solved the two-hat problem, with no split among the circuits. The leading case is *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2nd Cir. 1982) *cert. den.*, 459 U.S. 1069 (emphasis added):

> Although officers of a corporation who are trustees of its pension plan do not violate their duties as trustees by taking action which, after *careful and impartial investigation*, they reasonably conclude best to promote the interests of participants and beneficiaries simply because it incidentally benefits the corporation or, indeed, themselves, their decisions must be made with an *eye single* to the interests of the participants and beneficiaries.

One court recently explained:

> The presence of conflicting interests [maximizing reversion vs. protecting participants] imposes on fiduciaries the obligation to take precautions to ensure their duty of loyalty is not compromised . . . [They] may have to at a minimum undertake an intensive and scrupulous independent investigation of the fiduciary's options. . .

Bussian v. RJR Nabisco, Inc. 223 F.3d 286, 299 (5th Cir. 2000) [internal quotation marks omitted]. *See also, Waller v. Blue Cross of California*, 32 F.3d 1337 (9th Cir. 1994) and *Pilkington PLC v. Perelman*, 72 F.3d 1396 (9th Cir. 1995).

The Crown Directors blurred their roles. That is what triggered the duty of an "intensive and scrupulous independent investigation of the fiduciary's options."

Petitioner argues that merger is exclusively a plan sponsor function. But that observation does not solve the two-hat problem.[1] The Crown Board of Directors decided to terminate the plans for whatever business reasons it had. In implementing that decision, the same Board of Directors made or did not make various investigations and then took certain steps to reach their goals. In making those investigations and taking those steps, in whose interests were they working? What was their goal? An administrator, in discharging its fiduciary duties, is obliged to consider all permissible options. Why should the administrator *not* investigate options and, if necessary, lay them out before the sponsor? What social, political, or legal purpose is served by encouraging ignorance of what options might exist?

In the present case, merger was a practical, achievable option for fully providing benefits. The Crown Directors did in fact vote to merge twelve pension plans into one in order to purchase the annuity. SER 14. That the Crown Directors (as sponsor) could merge the plans in order to carry out the termination plan of the Crown Directors (as administrator) shows that there was no impediment to merging plans in order to carry out the PACE proposal. Had the Directors given adequate consideration to the proposal—and had they chosen the proposal—the Directors could have carried out the decision easily.

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[1] Indeed, the observation is not entirely accurate. The fact that a sponsor has a certain power does not necessarily prevent the administrator from exercising the same power. *See, DelGrosso v. Spang & Co.*, 776 F.Supp. 1065, 1068 (W.D.Pa. 1991), *aff'd.*, 968 F.2d 12 (3rd Cir. 1992) ("The right of plan sponsors to terminate pension plans. . . does not preclude plan administrators from also terminating plans, even in the face of employer opposition to termination.").

In sum, the Crown Board of Directors was in a conflict of interest. There is an established method under ERISA for dealing with such conflicts: a scrupulous, independent investigation of the options. The Bankruptcy Court, the District Court, and the Ninth Circuit got it right.

II. THE DECISION BELOW DOES NOT CONFLICT WITH OTHER DECISIONS

Petitioner argues that the Ninth Circuit decision conflicts with *Malia v. General Electric Co.*, 23 F.3d 828 (3rd Cir. 1994), *cert. den.*, 523 U.S. 956 (1994), and *Sutter v. BASF Corp.*, 964 F.2d 556 (6th Cir. 1992). Petitioner also claims a conflict with *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999), *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), and *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995).

There is no conflict. In *Malia*, Corporation 1 bought out Corporation 2, which became a wholly-owned subsidiary. Corporation 1 decided to merge the two pension plans into one, and to continue the merged plans under its own sponsorship. Termination was never an issue. The court in *Malia* observed that

> Under ERISA, the roles of plan administrator and plan sponsor are distinct. The plan administrator owes a fiduciary duty to the plan participants; the plan sponsor, *as long as it is not acting as an administrator*, generally does not.

23 F.3d at 833 (emphasis added). In *Malia*, the merger decision was a pure business decision, touching on no administrator functions. Under those circumstances, the employer owed no fiduciary duty to the participants.

In 1950 the employer in *Sutter* established two separate pension plans for the same employees, one of which allowed employee contributions. In 1961 the employer merged the two plans into one, adopting several formulas to calculate benefits, based on years of service, contributions, and other

factors. Over the decades the employer amended the plan in various ways, including changes in the formulas. In 1984 the employer considered a further amendment concerning withdrawn contributions, but decided against it. As in *Malia*, the plan in *Sutter* was ongoing under the employer's sponsorship. Ending the plan was never an issue. No administrator function was involved in the merger or amendment of the plan. The *Sutter* court correctly held the employer as sponsor had no fiduciary responsibility to the participants.

The trio of Supreme Court cases cited by petitioner hold that "In general, an employer's decision to amend a pension plan concerns the composition or design of the plan and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets." *Hughes*, 525 U.S. at 444. And in *Lockheed*, this Court observed, "only when fulfilling certain defined functions. . . does a person become a fiduciary. . ." 517 U.S. at 890.

And that is the difference between the cited cases and the present one. Although the decision to terminate a plan is generally a sponsor function, ERISA places implementation expressly and exclusively in the hands of the administrator. 29 U.S.C. § 1341. It is a "defined function" of the administrator. Under Section 1341(b)(3)(A), the administrator has a choice of options in providing full benefits and, of course, a concomitant duty to investigate those options. The cases cited by petitioner do not deal with termination procedures, or with the employer as administrator, or with an actual conflict between the employer as sponsor and employer as administrator.

When an employer chooses to take on the functions of an administrator, the employer also takes on the fiduciary obligations of an administrator. *Varity Corp. v. Howe*, 516 U.S. 489, 498-505 (1996). For instance, in *District 65, UAW v. Harper & Row, Publishers, Inc.*, 670 F.Supp. 550 (S.D.N.Y.

1987), the employer made a decision about the final distribution of plan assets in a termination—an allegedly unreasonable interest rate assumption in calculating the amount of lump-sum distributions. The court held that the employer could be liable as a fiduciary for two reasons. First, it was exercising "actual control over the disposition of plan assets." Secondly, it was "liable as a fiduciary because its acts with respect to implementing the termination required discretionary decisions on its part." *Id.* at 556. The same two factors are present in this case.

Even with an allegedly "pure" sponsor function such as amendment, the employer-as-administrator is obliged to investigate options so that the employer-as-sponsor can make an informed decision. *Scardelletti v. Bobo*, 897 F.Supp. 913, 917-919 (D.Md. 1995), *affirmed and reversed on other grounds*, 265 F.3d 195 (4th Cir. 2001). *See Devlin v. Scardelletti*, 536 U.S. 1 (2002), for subsequent history.

In sum, the Ninth Circuit's decision here rests on well-established ERISA principles and is consistent with the law of this Court and other federal courts.

III. THE DECISION BELOW DOES NOT CONFLICT WITH THE ADMINISTRATIVE AGENCIES' INTERPRETATION OF ERISA; VIEWS ADVANCED FOR THE FIRST TIME IN AN *AMICUS* BRIEF ARE ENTITLED TO LITTLE DEFERENCE

Petitioner argues that this Court should give deference to the views of the Pension Benefit Guaranty Corporation and the Department of Labor, as those views were expressed in their amicus briefs in support of rehearing in the Ninth Circuit. Respondents agree that their views are entitled to some deference. But opinions stated the first time in an amicus brief are entitled to little if any consideration.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984), the question was whether the term "stationary source" in the Clean Air Act referred to a single polluting device or to multiple devices within a single plant. The Environmental Protection Agency, after going through a formal rulemaking procedure and considering all public comments, promulgated a regulation that explicitly addressed the question. The Supreme Court held that, under those circumstances, federal courts should defer to the agency's decision.

But courts do not give *Chevron* deference to every expression of opinion by an administrative agency. As this Court recently explained:

> The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position. . . The approach has produced a spectrum of judicial responses, from great respect at one end, *see, e.g., Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389-390, 104 S.Ct. 2472, 81 L.Ed.2d 301 (1984) ("'substantial deference'" to administrative construction), to near indifference at the other, *see, e.g., Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-213, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988) (interpretation advanced for the first time in a litigation brief). Justice Jackson summed things up in *Skidmore v. Swift & Co.*: "The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

United States v. Mead, 533 U.S. 218, 227-228 (2001), quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

A litigation brief, especially an amicus brief, while entitled to consideration according to its persuasive power, is not binding on the courts. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-213 (1988); *Padash v. INS*, 358 F.3d 1161, 1168, note 6 (9th Cir. 2004). *See also, Shikles v. Sprint/ United Management Co.*, 426 F.3d 1304, 1315-1316 (10th Cir. 2005).

A. The Ninth Circuit's Decision Is in Accord with Applicable Administrative Regulations

The core regulation here is 29 CFR § 4041.28(c)(1) (emphasis added). When PBGC first proposed this section, it read:

> The plan administrator shall, in accordance with all applicable requirements under the Code and ERISA, distribute plan assets in satisfaction of all benefit liabilities (determined as of the termination date). In the case of benefit liabilities that must be provided in annuity form, the distribution shall be made *by purchasing irrevocable commitments from an insurer* selected in accordance with the fiduciary standards of Title I of ERISA.

62 *Fed. Reg.* 12508, 12515 (3/17/97). That regulation might have supported petitioner's argument. But when it actually promulgated the regulation, PBGC rewrote it to include the words "or in another permitted form":

> The plan administrator must, in accordance with all applicable regulations under the [Internal Revenue] Code and ERISA, distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer *or in another permitted form.*

62 *Fed. Reg.* 60424, 60434 (11/7/97). That is the current regulation, and it supports respondents' position.

In the long course of this litigation, respondents have repeatedly challenged petitioner to name a regulation that the proposed merger would violate, but petitioner never did so.

Now, for the first time in this petition for certiorari, petitioner cites PBGC regulation 29 C.F.R. § 4041.23(b)(9). This Court should not consider the argument at all in this petition for certiorari.

Section 4041.23(b)(9) requires that the notice of termination to participants include a notice that "PBGC's guarantee is extinguished." 29 C.F.R. § 4041.23. Since a merger would not extinguish PBGC's guarantee—but would rather shift it from the single-employer insurance program to the multiemployer insurance program—the required termination notice could not possibly be correct for a merger. Therefore mergers are not permissible. So runs the argument—though it sounds a great deal like the tail wagging the dog.

In any case, the argument is unsound. The premise that a termination notice must include an "extinguishment" clause is incorrect. One sort of termination is a "spin-off/termination," in which one plan transfers assets and liabilities to a newly created plan, then terminates, with the employer taking the reversion. Although it is a form of termination, PBGC will continue to guarantee benefits in the newly created plan. What, then, of the "extinguishment" clause? In such a case, 29 CFR § 4041.23(c) requires the administrator only to "provide a notice describing the transaction to all participants." In other words, the "extinguishment" clause is required when there will indeed be an extinguishment, but not otherwise. It is true that 29 CFR § 4041.23(c) refers only to spin-off/terminations—not to mergers. But the only difference between a spin-off/termination and the present case is that the receiving plan here, instead of being newly created, is an already existent multiemployer plan. Unless the failure to mention mergers in this obscure regulation is read as an

implicit prohibition, it means only that the PBGC regulations do not expressly cover all possible situations.[2]

Respondents suggest that if the PBGC regulations have gaps, flaws, conflicts, or ambiguities, that agency, rather than this Court, is in the best position to remedy those deficiencies through the normal rule-making process.

B. The Ninth Circuit's Decision Is in Accord with PBGC Opinion Letters

As it happens, the PBGC has directly addressed the question of whether ERISA permits "a transfer of assets and liabilities from a single-employer to a multiemployer plan, with a resulting termination of the single-employer plan." *Opinion Letter 85-25* (10/11/85). Appendix D *infra* at 14a.

Opinion letters are not entitled to full *Chevron* deference since they have not gone through the formal process of rule-making. They are, however, "entitled to great weight" when they interpret the agency's own regulations. *In re Wal-Mart Stores, Inc.*, 395 F.3d 1177, 1184 (10th Cir. 2005). *See, e.g., Mead Corp. v. Tilley*, 480 U.S. 714, 722 (1989) ("The PBGC consistently has expressed [a certain] view in Opinion Letters addressing proposed plan terminations.").

Before we examine *Opinion Letter* 85-25, let us look at its context.

29 U.S.C. § 1341(b) was enacted as part of the Single Employer Pension Plan Amendments Act of 1986 (P.L. 99-272, Title XI). In the preceding years, plan sponsors had engaged in all sorts of shenanigans to reach surplus assets in

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[2] In its amicus brief on petition for rehearing, PBGC pointed to other regulations which, according to PBGC, impliedly suggest that merger is not a permitted form of guaranteeing benefits in a termination. If the PBGC files an amicus brief here, respondents intend to file a supplemental brief.

their pension plans without terminating the entire plan. The basic maneuver was to transfer assets and liabilities among plans so that one plan would be left with some assets but no liabilities. That one plan would then be terminated with the plan sponsor pocketing the assets as a reversion. The remaining plans would continue to provide benefits to the participants—but of course there would be fewer assets for that purpose.

To deal with these abuses, three regulatory agencies, the PBGC, the Department of Labor, and the Internal Revenue Service, jointly issued "*Implementation Guidelines*" on May 23, 1984, appended at page 1a.[3] The basic notion of the *Guidelines* was that before a plan sponsor may receive a reversion from a termination, an annuity should, in general, be purchased for the affected participants. An annuity guarantees that participants will receive their benefits, regardless of how the plan sponsor manipulates the pension plans or for what purpose. Participants will not be left in an ongoing but financially shaky pension plan.

But the *Guidelines* were not intended to prevent reversions or require annuities when there was some sound, independent business reason for the spin-off, merger or transfer. The *Guidelines* apply only when the maneuvers have no economic meaning except to enable the sponsor to reach surplus assets. In 1985, the PBGC issued a series of Opinion Letters to explain the reach of the *Guidelines*.

In *Opinion Letter* 85-11 (5/14/85), Appendix B *infra* at 6a, an employer had sound business reasons for splitting a pension plan into two. The PBGC stated that an employer could terminate one of the two plans and take a reversion, *without purchasing an annuity*, because it had a good reason for making the split in the first place.

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[3] Apparently these *Guidelines* never went through the rule-making process.

In *Opinion Letter* 85-21 (8/26/85), Appendix C *infra* at 10a, an employer (after collective bargaining) wished to create a new pension plan for unionized employees. The employer wanted to transfer assets and liabilities to the new plan, leaving surplus assets in the original plan, terminating the same, and taking a reversion. This was acceptable to the PBGC.

Finally, in *Opinion Letter* 85-25 (10/11/85), Appendix D *infra* at 14a, the employer wished to terminate a plan and take the reversion. The union proposed that instead of purchasing an annuity, the employer transfer assets and liabilities to a multiemployer plan. The PBGC was asked whether the *Guidelines* prevented the employer from taking a reversion in this situation. The PBGC stated that ". . . a transfer from a single-employer plan to an ongoing multiemployer plan followed by the termination of the single-employer plan, is not generally a transaction to which [the Guidelines] apply." The PBGC went on to state, understandably, that the multiemployer plan must be financially sound and that the amount of assets transferred must be commensurate with the transferred liabilities. But there was nothing inherently wrong or impossible about the proposed transaction. The present case is on all fours with *Opinion Letter* 85-25. Indeed, this situation presents a stronger case, since there could hardly be a better reason for terminating a plan than the liquidation of the employer in bankruptcy.

These Opinion Letters demonstrate that under ERISA a termination (and consequent reversion) does not require the purchase of an annuity. It does require that the benefit liabilities be protected, but this can be accomplished through a successor plan or a transfer of liabilities and assets to a multiemployer plan, as in *Opinion Letter* 85-25.

Those Opinion Letters were contemporaneous with Congress's consideration and passage of the Single Employer Pension Plan Amendments of 1986, which contained Section

1341(b)(3)(A). *See* H.R. Rep. 99-241 for background and history. The legislation accords completely with the Opinion Letters just discussed. It shows the intention of Congress that in the course of a termination, the participants must have their benefits fully protected, *either* through an annuity *or* through some other mechanism which accomplishes the same purpose.

IV. THE DECISION DOES NOT "DESTABILIZE" ERISA LAW IN THE NINTH CIRCUIT

A. The Ninth Circuit Decision Does Not Put the Benefits of Plan Participants at Risk

Petitioner argues that "a merger simply does not guarantee that plan participants will receive their full plan benefits." Pet. at 15. The argument was raised for the first time in its *Petition for Rehearing* in the Ninth Circuit and should not be considered now. *United States v. Patzer*, 284 F.3d 1043 (9th Cir. 2002).

In any event, the argument verges on the absurd. Before one plan can merge with another, the new merged plan must provide the same benefits as before, 29 U.S.C. § 1412(b). Petitioner argues (at pages 20 and 21) that a multiemployer pension plan might become insolvent. True—but so might an insurance company. *See, e.g., Waller v. Blue Cross of California*, *supra*, 32 F.3d 1337 (9th Cir. 1994). Petitioner argues that when a multiemployer plan becomes insolvent, PBGC will guarantee participants only $13,000 per year. That is also true—but it is a strange argument here. If an insurance company becomes insolvent, the PBGC guarantees nothing. PBGC *Opinion Letter 91-1* (1991).

B. The Decision Below Does Not Thwart ERISA's Objective of Encouraging Employers to Fund Pension Plans Adequately

Petitioner argues that requiring plan administrators to consider merger as an alternative to purchase of an annuity would

somehow "reduce or eliminate the plan sponsor's entitlement to residual assets," and thereby discourage adequate funding. That is a policy argument best left to Congress.

Congress has already spoken to the issue. First, Congress has enacted tax legislation designed to prevent overfunding of plans. 26 U.S.C. § 404(a)(1).

Secondly, when it enacted Section 1341(b)(3)(A) in 1986, Congress did not intend potential reversion of surplus assets to act as any sort of incentive for employers. The Committee on Education and Labor stated:

> [T]he Committee expressly states that nothing in this legislation is intended to express an opinion on the legality or desirability of the current practice of termination of overfunded pension plans and recapture of excess assets by plan sponsors.

H.R. Rep. 99-272, p. 296. In other words, while it might strike some as wise policy to encourage overfunding, it is not the policy of Congress.

Finally, when it enacted 29 U.S.C. § 1412 in 1980, Congress's purpose was not only to permit mergers but to encourage them.

> The rules regarding mergers and transfers are designed to allow mergers in all cases where the resulting plan will not be expected to be in financial trouble. This facilitates the Committee's *purpose of encouraging mergers* which expands a plan's contribution base to provide greater stability.

H.R. Rep. 96-869 p. 87 (emphasis added). That is still sound policy.

In sum, merger does not conflict with Congressional policy, but accords with it.

C. The Decision Below Does Not Jeopardize PBGC's Interest in Obtaining Insurance Premiums

Petitioner never raised this argument below. It should not be considered now.

In any event, the argument is unsound. Indeed, it is backwards. When a plan terminates through purchase of an insurance company annuity, premiums to PBGC cease. When a plan merges into another plan, premiums continue. 29 U.S.C. § 1307(e)(1),

V. THE DECISION BELOW IS NOT ERRONEOUS

A. ERISA Permits Termination Either Through Purchase of an Annuity or Through Merger

Petitioner argues, "The crux of the Ninth Court's decision is its conclusion that ERISA permits termination of a single-employer pension plan by merger into a multi-employer pension plan. This conclusion is erroneous because. . ."

Even if the Ninth Circuit's conclusion is erroneous, there is no compelling reason for this Court to hear the matter. Congress frequently amends ERISA and the Ninth Circuit's supposedly erroneous conclusion could be corrected with the change of a few words—for instance, by striking Section 1341(b)(3)(A)(ii). Which would make the purchase of an annuity mandatory.

Petitioner (or, rather, Crown Vantage, Inc.) did not raise this issue at the trial stage in Bankruptcy Court.[4] It was first raised on appeal to the District Court.

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[4] In its decision, the Ninth Circuit stated, "As in the bankruptcy and district courts, Crown argues that it did not breach its fiduciary duties. . . because merger into a multiemployer plan is an impermissible means of terminating a pension plan under ERISA [and] its implementing regulations." App. 3. Respectfully, the Ninth Circuit was mistaken. In the

The central premise of petitioner's argument is that mergers and termination are "mutually exclusive" under ERISA. Petitioner cites *Franklin v. First Union Corp.*, 84 F.Supp.2d 720 (E.D.Va. 2000), for the proposition. *Franklin* is not apt. The present case arises under 29 U.S.C. § 1341, which applies only to defined benefit plans, like the Crown plans. 29 U.S.C. § 1301(a)(15). *Franklin* concerned defined contribution plans, where both the law and the policy considerations are vastly different.

It is true in a trivial sense that a merger is not a "termination". But neither is the purchase of an annuity a "termination." ERISA defines the "termination" of a single-employer defined benefit plan in operational terms. It is a scripted process:

(1) the plan administrator must give notice to the participants and the PBGC, 29 U.S.C. § 1341(b)(2)(A) and (B);

(2) the PBGC reviews the notice, Section 1341(b)(2)(C);

(3) the plan administrator makes a "final distribution", Section 1341(b)(2)(D); and

(4) the plan administrator certifies that the distribution has been made, Section 1341(b)(3)(B).[5]

"Final distribution" is one step in the process. Section 1341(b)(3)(A) (emphasis added), describes the methods available to plan administrators for "final distribution":

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bankruptcy court, Crown argued only that it owed no fiduciary duty because it was a plan sponsor, and that it adequately fulfilled any fiduciary duty. Crown raised the "impermissible means" argument for the first time in its appeal to the District Court. It was an afterthought.

[5] *DelGrosso v. Spang & Co.*, *supra*, 776 F.Supp. at 1068, gives a concise history of Section 1341.

> . . . In connection with any final distribution of assets pursuant to the standard termination of the plan . . . the plan administrator shall—
>
> (i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan ***or***
>
> (ii) in accordance with the provisions of the plan and any applicable regulations, ***otherwise fully provide all benefit liabilities*** under the plan. . . .

The phrase "otherwise fully provide all benefit liabilities" is not defined—but its meaning is plain enough: the alternative to an annuity—whatever that alternative may be—must provide at least the same benefits as the terminating plan.[6] The gist of Crown's argument is that although Section 1341(b)(3)(A)(ii) permits a plan administrator to "otherwise fully provide all benefits," it implicitly excludes a transfer of assets and liabilities as a means of doing so. But on its face, Section 1341(b)(3)(A) permits *any* method that will "otherwise fully provide all benefits liabilities under the plan," provided they are consistent with the plan documents and applicable regulations. The transfer of assets and liabilities from one plan to another, or merger, is of course expressly permitted under ERISA, 29 U.S.C. § 1412(b), and applicable regulations, like 26 C.F.R. § 1414(*l*).

When Congress amended Section 1341 in 1986, it did so with knowledge that Section 1412, permitting the merger of single and multiemployer plans, was already on the books and in the same title. A careful reading and re-reading of the 1986 legislative history reveals no suggestion that Congress preferred annuities to other methods of providing benefits to retired workers, or that it preferred insurance companies to

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[6] The term "benefit liabilities" means simply "benefits," 29 U.S.C. § 1301(a)(16)—i.e., the periodic payments to which beneficiaries are entitled from retirement or disability until death.

multiemployer plans as a provider of benefits. Congress's only purpose was to assure full payment of pensions upon termination.

> Under a standard termination, the plan must contain sufficient assets to pay for the benefit entitlements of all participants and beneficiaries. . . [P]articipants and beneficiaries will receive all benefits to which they are entitled under the terms of the plan.

H.R. 99-241, page 295. Purchase of an annuity can accomplish that purpose. So can merger into another plan.

B. Other Arguments Advanced by Petitioner Lack Merit

The petition lists six areas in which merger and termination requirements supposedly conflict. None withstands scrutiny.

First, petitioner states that termination allows for reversion while merger does not. Not so. As PBGC *Opinion Letter* 85-25 makes clear, reversion following merger is possible. The PIUMPF proposal happened not to provide for a reversion, but nothing in the law precludes it. Petitioner cites 26 C.F.R. § 1414(*l*)-1(b)(2), but that section concerns a different issue: the segregation of transferred funds and transferred liabilities.

Second, petitioner argues that a merger does not "fully provide for all benefit liabilities." Respondents answer this argument above in Part V Section A at 21.

Third, petitioner argues that Section 1341 requires "distribution" among the participants, but in a merger the funds are mixed into the multiemployer plan generally. That is true—but it is also true of the purchase of an annuity, where the premium becomes an asset of the insurance company and becomes available to pay all claims against the company.

Fourth, petitioner argues that PBGC coverage continues after a merger but ceases when an annuity is purchased. Re-

spondents consider that to be an excellent result and in no way contrary to any portion of ERISA.

Fifth, Petitioner argues that merger does not end a plan sponsor's obligation to pay PBGC premiums. The argument is wrong. Under 29 U.S.C. § 1307(e)(1), the plan sponsor of a single-employer plan is the "designated payor" of premiums. But when the single-employer plan terminates through merger, the plan administrator of the multi-employer plan becomes the "designated payor". The original plan sponsor is off the hook but PBGC will continue to receive premiums.

Sixth and finally, petitioner argues that the termination notice requirements cannot be fulfilled in a merger. Respondents address the issue above in Part III A at 13.

In sum, nothing in ERISA or the surrounding regulations preclude merger as a means of "otherwise providing" for benefit payments in a termination.

C. Scrupulous Investigation of Options Is a Fiduciary Duty Owed by the Plan Administrator

Petitioner concludes his argument by repeating that a decision to merge is a sponsor function. As a matter of abstract black-letter law, the assertion may have some merit—but it misses the point of this case.

Acting as plan administrator, Crown Vantage, Inc., was obliged to consider all available options in the termination process. Merger was an option available to Crown. Crown nonetheless deliberately failed to investigate that option, thereby reaping—or attempting to reap—a windfall of $5 million dollars from overfunded plans, while at the same time abandoning underfunded plans.

CONCLUSION

For all of the reasons stated above, the Court should deny the petition.

Respectfully submitted,

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June 12, 2006

APPENDIX

APPENDIX A

[Logo] **NEWS**

Pension Benefit
Guaranty Corporation
2020 K Street, N.W.
Washington, D.C. 20006

FOR IMMEDIATE RELEASE
May 23, 1984

CONTACT: Peter A. Kirsch, Director
Communications & Public
Affairs Dept.

or

Jane McVicker
Public Affairs Specialist
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ERISA AGENCIES ANNOUNCE IMPLEMENTATION GUIDELINES ON ASSET REVERSIONS

The Pension Benefit Guaranty Corporation (PBGC) announced today that along with the Treasury Department and the Department of Labor, it has agreed to joint implementation guidelines for dealing with pension plan terminations in which the employer recovers excess assets. The agencies are now proceeding to process cases in accordance with these guidelines. Appropriate steps will be taken by each agency through regulations and otherwise to establish the indicated procedures.

"We believe that the implementation guidelines we are adopting reflect a fair balancing of the rights of plan participants, plan sponsors, and the public interest," said Charles Tharp, executive director of the PBGC. "It is important that plan participants receive the full benefits to which they are entitled at termination, while recognizing the rights of plan

sponsors to any surplus above that. And we believe it is essential that policies in this area encourage the establishment and maintenance of defined benefit pension plans."

* * *

ATTACHMENT: Joint Implementation Guidelines

IMPLEMENTATION GUIDELINES

The following has been adopted by the Department of the Treasury, the Department of Labor and the Pension Benefit Guaranty Corporation to provide guidelines for processing defined benefit pension plan terminations involving asset reversions to the plan sponsor.

1. In accordance with current law, when an employer terminates a defined benefit pension plan, it may not recover any surplus assets until it has fully vested all participants' benefits and has purchased and distributed annuity contracts, to protect participants against the risk that their accrued benefits may be jeopardized by future market fluctuations or other factors.

2. At present, upon plan termination, employers can make lump sum payments to certain participants. In some cases, these lump sums have been calculated on the basis of interest rates that are higher than those available to individuals, thereby reducing the value of those benefits. This problem must be addressed. If employees are offered lump sum payments in lieu of future pensions, the amount of the lump sum must fairly reflect the value of the pension to the individual. The Pension Benefit Guaranty Corporation is developing guidelines for determining appropriate lump sum values.

3. An employer that terminates a sufficient defined benefit pension plan may establish a new defined benefit plan covering the same group of employees. The new plan may grant past service credit for the period during which

an employee was covered by the terminated plan (subject to the limitations of Section 415 of the Internal Revenue Code). The prior plan and the new plan, in combination, may provide benefits for each participant equivalent to those to which the participant would have been entitled if the prior plan had continued without interruption. The PBGC will clarify the fact that a successor plan is exempt from the five year phase-in of benefit guarantees that applies to newly established plans. The above is one example of what will be deemed a successor plan by the PBGC.

4. In the case of a so-called "spinoff/termination", generally no termination will be recognized and any attempt to recover surplus assets will be treated as a diversion of assets for a purpose other than the exclusive benefit of employees and beneficiaries unless the following conditions are satisfied:

   * The benefits of all employees (including those covered by the ongoing plan) must be fully vested and nonforfeitable as of the date of termination.

   * All benefits accrued as of the date of termination in the ongoing plan must be provided for by the purchase of annuity contracts which represent irrevocable commitments for the benefit of each individual participant.

   * All employees who were covered by the original plan must be given advance notice of the transaction in similar time and manner as if the entire original plan were being terminated.

5. In the case of a so-called "spin-off/termination" and a so-called "termination/re-establishment" transaction, generally any attempt to recover surplus assets will be treated as a diversion of assets for a purpose other than the exclusive benefit of employees and beneficiaries unless the following conditions are satisfied:

(a) In the case of an ongoing plan described in number 4 above, the funding method for the ongoing plan must be changed on the date of termination by combining and offsetting amortization bases in accordance with §412(b)(4) of the Code. The amortization period for this base will be the lesser of the combined amortization period and the weighted average future remaining working lifetime of all covered employees. The employer must request and obtain IRS approval for this change in funding method.

(b) In the case of a new plan established with credit for past service as described in number 3 above, in order to obtain a reversion of surplus assets from the terminated plan, the future amortization period for the unfunded past service liability for the new plan, under Section 412 of the Code, will be the lesser of 30 years and the weighted average future remaining working lifetime of all covered employees. The employer must request and obtain IRS approval for this change in funding method for the new plan.

The agencies' analysis indicates that, in spinoff/terminations where the conditions in numbers 4 and 5a are satisfied, the security of participants' benefits is protected by the purchase and distribution of annuities, the statutory minimum funding rules, including the rules described in number 5(a), and PBGC insurance coverage.

6. Employers are reminded that one of the requirements for plan qualification is that the plan be intended to be permanent. In any case, the funding rules generally require that plan funding be on a going concern basis rather than on a termination basis. Thus, the tax consequences of multiple "termination/re-establishments" or "spin-off/terminations" are unaffected by these guidelines and will be determined without regard to whether the specific guidelines described above are satisfied

with regard to each of the transactions. Generally, an employer may not engage in either a termination/re-establishment or spin-off/termination transaction, involving reversion of assets, any earlier than 15 years following any such transaction.

7. The federal income tax consequences of the receipt of reversions, of deductions for contributions to ongoing or successor plans and of the funding of such plans, after the change in funding method, are unaffected by these guidelines.

8. The PBGC will continue to process and the IRS will now proceed to process all pending termination cases.

APPENDIX B

Opinion Letter

85-11

May 14, 1985

STATUTE/REGULATION SECTION:
4044 Allocation of Assets
4044(d)(1)

LETTER:

The PBGC has reviewed your presentation of the facts and circumstances surrounding the proposed termination of the Retirement Plan for Salaried Employees of ***** Plan)[1] and the reestablishment of a defined benefit plan for the same group of employees providing the same benefits as provided in the Salaried Plan with an offset for amounts paid under the Salaried Plan. The Salaried Plan was created as a result of the split-up of The Retirement Plan for Employees of ***** Company (Annuity Plan) as of *****, into the Salaried Plan and the Retirement Plan for Certain Hourly Employees of The ***** (Hourly Plan). As part of the split-up, excess assets of the Annuity Plan were allocated between the Salaried Plan and Hourly Plan in proportion to the accrued benefits under those plans.

This will advise you that PBGC has concluded, on the basis of its review of the facts and circumstances of this case, that the split-up of the Annuity Plan followed by the termination of the Salaried Plan is not subject to the requirements of paragraph #4 of the Implementation Guidelines (Guidelines) issued May 24, 1984, by the PBGC, the Treasury Department and the Department of Labor (the agencies). Paragraph 4 of the Guidelines applies to "spin-off/termination" cases, and in

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[1] A Notice of Intent to Terminate the Salaried Plan was filed with the PBGC on October *****, 1984.

pertinent part provides that a termination of one part of a split-up plan will not be recognized unless benefits under the ongoing part of the split-up plan are fully vested and non-forfeitable as of the date of termination and all benefits accrued as of the date of termination in the ongoing plan are provided for by the purchase of annuity contracts that represent irrevocable commitments for the benefit of each individual participant.

Your presentation of the facts is as follows. For about forty years ***** Company (the Company) had maintained the Annuity Plan that covered salaried and non-union hourly personnel. While the Annuity Plan was initially intended to cover only salaried employees, non-union hourly employees were routinely included until about *****. Thereafter, the Company believed it desirable to maintain separate plans for salaried and non-union hourly employees. Thus, when two new plants were opened in the *****, non-union hourly employees in those Plants were provided separate pension plans. No action was taken with respect to the Annuity Plan, however, until the Company undertook a review of the Annuity Plan in *****. In *****, representatives of the Company and of the insurance company that issued a group annuity contract under the Annuity Plan met to discuss a split-up of the Annuity Plan into separate plans for salaried employees and non-union hourly employees with an expected target date of *****. In early *****, senior management of the Company approved the split-up, and in *****, *****, the split-up and other employee benefit changes that the Company had been working on were announced to employees. Form 5310, advance notification to Internal Revenue Service (IRS) of the split-up was filed with IRS on *****.

In *****, the Company was informed by outside advisors of the potential for the recovery of excess assets if a pension plan were terminated and then reestablished. Among other things, consideration was given to withdrawing the notice of

the split-up given to IRS and terminating the entire Annuity Plan, which at that time had not been split up. The Company decided to proceed with the split-up, and the transfer of assets and liabilities to the separate Salaried and Hourly Plans was effected on *****, *****. On *****, the Company's Pension Committee recommended termination of the Salaried Plan following the "termination/reestablishment" approach discussed below. On October ***** 1984, a Notice of Intent to Terminate the Salaried Plan was filed with PBGC.

Section 4044 of Title IV of ERISA sets forth rules for the allocation of assets where there is a termination of a single employer defined benefit plan. Under Section 4044(d)(1), after all liabilities to participants and beneficiaries have been satisfied, residual assets may be distributed to the employer maintaining the plan if the plan provides for such a distribution. Further, there is no prohibition in Title IV against an employer's effecting a termination of a plan, recovering excess assets from that plan and then establishing a new defined plan for the same group of employees covered by the terminated plan with the same benefits as in the terminated plan. Such an arrangement is a so-called "termination/reestablishment." See Guidelines paragraph #3.

As a general proposition, nothing in Title IV speaks to responsibilities and limitations in ongoing plans. It follows that nothing in Section 4044 permits the extraction of residual assets from a plan that is ongoing. It is the agencies' interpretation that an employer cannot invoice Title IV provisions that permit asset distribution merely by taking steps that, in form, appear to bring about a termination of a plan, when in substance the arrangement viewed as a whole does not constitute a full termination. A classic example that in substance fails to constitute a termination is a sequence of transactions that purportedly split a plan with excess assets into two parts, one part of active participants that continues under the same terms and conditions as prior to the split-up and the

other part for retirees and deferred vested participants (inactives' part), and then terminate the inactives' part with a reversion of excess assets to the employer. Where part of the plan remains ongoing, the effect of the transactions would be the recovery of excess assets from a plan without satisfying the basic elements of a plan termination, the vesting and annuitization of the benefits of all participants. Accordingly, the agencies determined that certain transactions, including, but not limited to, the example, set forth above, would violate the law's requirements unless, among other things set forth in the Guidelines, benefits in the ongoing part of the plan were fully vested and annuitized.

PBGC has carefully reviewed the documentation of the above described facts, including internal corporate memoranda and an affidavit from *****, Vice President-Finance and Treasurer of the Company, that you submitted to us. Based on these facts, PBGC has concluded that the split-up of the Annuity Plan into the Salaried Plan and the Hourly Plan followed by the proposed termination of the Salaried Plan with a reversion of excess assets to the Company is not a transaction to which the spinoff/termination requirements of the Guidelines apply. Accordingly, PBGC will recognize the termination and reestablishment of the Salaried Plan without the necessity of the vesting and annuitization of benefits under the Hourly Plan.

The conclusions set forth in this letter are limited to Title IV of ERISA only. Any opinions of the consequences under Title I of ERISA and the Internal Revenue Code must be obtained from the Department of Labor and the Internal Revenue Service, respectively.

Mitchell L. Strickler
Deputy Director

APPENDIX C

Opinion Letter

85-21

August 26, 1985

STATUTE/REGULATION SECTION:
4044 Allocation of Assets
4044(d)(1)

LETTER:

The PBGC has reviewed your presentation of the facts and circumstances surrounding the split-up and proposed termination of the ***** (the "Retirement Plan"). The split-up occurred on *****, when, as the result of collective bargaining negotiations, employees represented by ***** (the "Union") were transferred to the newly created ***** Plan for Hourly Employees (the "Hourly Plan"). That portion of the Retirement Plan's excess assets attributable to the accrued benefits of the Union participants was likewise transferred to the Hourly Plan. ***** (the "Company"), then proposed terminating the Retirement Plan and establishing a new plan, effective as of *****, for those employees affected by its termination.[1]

This will advise you that the PBGC has concluded, on the basis of its review of the facts and circumstances of this case, that the split-up of the Retirement Plan and creation of the Hourly Plan followed by the termination of the Retirement Plan is not subject to the requirements of paragraph 4 of the Implementation Guidelines (the "Guidelines") issued on May 23-24, 1984, by the PBGC, the Treasury Department and the Department of Labor (the "agencies"). Paragraph 4 of the Guidelines applies to "spin-off/termination" cases, and in per-

[1] A Notice of Intent to Terminate the Retirement Plan was filed with the PBGC proposing a termination date of *****.

tinent part provides that a termination of one part of a split-up plan will not be recognized unless benefits under the ongoing part of the split-up plan are fully vested and nonforfeitable as of the date of termination and all benefits accrued as of the date of termination in the ongoing plan are provided for by the purchase of annuity contracts that represent irrevocable commitments for the benefit of each individual participant.

Your presentation of the facts is as follows. The Retirement Plan was established on *****, to provide retirement benefits for certain of the Company's employees, including those represented by the Union. At some point prior to the split-up and as part of the collective bargaining process, Company and Union officials met to discuss the termination of the Retirement Plan and reestablishment of a new defined benefit plan. Upon termination of the Retirement Plan all excess assets would revert to the Company. The Company offered the Union the choice of (1) having hourly employees represented by the Locals "participate" in the termination of the plan (and the adoption of a new defined benefit pension plan), in which event all benefits accrued to the date of the termination would be vested (to the extent not already vested) and annuities would be purchased for such benefits, or (2) "continuing" the present situation, in which event "termination" vesting would not apply, annuities would not be purchased, and benefits would continue to be provided by a trust fund.

The Union chose to have its employees, as well as that portion of the Retirement Plan's excess assets attributable to their accrued benefits, transferred to the new Hourly Plan. You have indicated that the Union chose this course due to its concern about the financial stability of insurance companies and its belief that its bargaining position for future benefit improvements would be adversely affected if there were no excess assets in a plan for its members. On *****, the Retirement Plan was split-up and the Hourly Plan created, and this was followed by the termination of the Retirement

Plan and proposed reversion of the remaining excess assets to the Company.

Section 4044 of Title IV of ERISA sets forth rules for the allocation of assets where there is a termination of a single employer defined benefit plan. Under Section 4044(d)(1), after all liabilities to participants and beneficiaries have been satisfied, residual assets may be distributed to the employer maintaining the plan if the plan provides for such a distribution. Further, there is no prohibition in Title IV against an employer's effecting a termination of a plan, recovering excess assets from that plan and then establishing a new defined benefit plan for the same group of employees covered by the terminated plan with the same benefits as in the terminated plan. Such an arrangement is a so-called "termination/reestablishment." See Guidelines paragraph 3.

As a general proposition, nothing in Title IV speaks to responsibilities and limitations in ongoing plans. It follows that nothing in Section 4044 permits the extraction of residual assets from a plan that is ongoing. It is the agencies' interpretation that an employer cannot invoke Title IV provisions that permit asset distribution merely by taking steps that, in form, appear to bring about a termination of a plan, when in substance the arrangement viewed as a whole does not constitute a full termination. A classic example that in substance fails to constitute a termination is a sequence of transactions that purportedly (1) split a plan with excess assets into two parts: one part for active participants that continues under the same terms and conditions as prior to the split-up and the other part for retirees and deferred vested participants (the "inactives' part"), and (2) permit the termination of the inactives' part with a reversion of excess assets to the employer. Where part of the plan remains ongoing, the effect of the transactions would be the recovery of excess assets from a plan without satisfying the basic elements of a plan termination, the vesting and annuitization of the benefits of all par-

ticipants. Accordingly, the agencies determined that certain transactions, including, but not limited to, the example set forth above, would violate the law's requirements unless, among other things set forth in the Guidelines, benefits in the ongoing part of the plan were fully vested and annuitized.

The PBGC has carefully reviewed the events leading up to the split-up and proposed termination of the Retirement Plan. Based on these facts, the PBGC has concluded that the split-up of the Retirement Plan and creation of the Hourly Plan followed by the termination of the Retirement Plan with a reversion of excess assets to the Company is not a transaction to which the spin-off/termination requirements of the Guidelines apply. Accordingly, the PBGC will recognize the termination and proposed reestablishment of the Retirement Plan without the necessity of the vesting and annuitization of benefits under the Hourly Plan.

The conclusions set forth in this letter are limited to Title IV of ERISA only. Any opinions of the consequences under Title I of ERISA and the Internal Revenue Code must be obtained from the Department of Labor and the Internal Revenue Service, respectively.

Edward R. Mackiewicz
General Counsel

APPENDIX D

Opinion Letter

85-25

October 11, 1985

STATUTE/REGULATION SECTION:
Joint Implementation Guidelines

LETTER:

This is in response to your request for the opinion of the Pension Benefit Guaranty Corporation (PBGC) on whether the asset reversion guidelines of May 23, 1984, apply to a transfer of assets and liabilities from a single-employer pension plan to a multiemployer plan, with a resulting termination of the single-employer plan.

In your fact situation, a company that currently maintains a single-employer plan covering its union employees is involved in collective bargaining negotiations over an expired collective bargaining agreement. As part of the negotiations, the company has proposed a termination of its single-employer plan, with a resultant reversion of excess assets to the company (as permitted by the plan document). The union that represents the company's employees is willing to agree to the termination subject to certain conditions, one of which is that the company become a participant in, and transfer assets and liabilities to, a multiemployer pension plan to which the union is already a party. The multiemployer plan in question is fully funded.

As you mention in your letter, the PBGC, in cooperation with the Department of Labor and the Internal Revenue Service, has issued asset reversion guidelines to deal with various issues raised in connection with an employer's receipt of surplus assets following the termination of a defined benefit pension plan. It is the agencies' interpretation that an em-

ployer cannot invoke the termination and asset distribution provisions of Title IV of the Employee Retirement Income Security Act (ERISA) merely by taking steps that, in form, appear to bring about a termination of a plan, when, in substance, the transaction does not constitute a full termination. Accordingly, the guidelines state the agencies' determination that, among other things, the law requires that the benefits of participants in an ongoing plan following a so-called "spin-off/termination" be fully vested and annuitized.

Exceptions to the application of these provisions depend on the circumstances of a transaction. The transaction you describe, a transfer from a single-employer plan to an ongoing multiemployer plan followed by the termination of the single-employer plan, is not generally a transaction to which the spin-off/termination requirements of the guidelines apply. However, if the transaction lacks a substantial business purpose and instead is intended as a means to recover surplus plan assets without satisfying the plan termination requirements of Title IV of ERISA, the PBGC will not recognize the termination under Title IV. A valid plan termination is a prerequisite to a reversion of surplus plan assets to an employer. An intent to circumvent the termination requirements can be indicated by many factors including, but not limited to, the size of the transferor employer relative to the other employers participating in the multiemployer plan, the stability and financial health of the multiemployer plan, and the amount of assets relative to the liabilities that are transferred to the multiemployer plan.

The conclusions set forth in this letter are limited to Title IV of ERISA. Any opinions relating to Title I of ERISA and the Internal Revenue Code must be obtained from the Department of Labor and the Internal Revenue Service, respectively.

I hope this information is of assistance to you. If you have further questions, please contact the attorney handling this matter, *****, of the PBGC's Corporate Policy and Regu-

lations Department. ***** telephone number is (202) 254-4860.

Edward R. Mackiewicz
General Counsel

No. 05-1448

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In the

Supreme Court of the United States

JEFFREY H. BECK,
Liquidating Trustee of the Estates of
Crown Vantage, Inc. and Crown Paper Company,
Petitioner,

v.

PACE INTERNATIONAL UNION, EDWARD J. MILLER,
and JEFFREY D. MACEK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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August 8, 2006

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner incorporates by reference the Corporate Disclosure Statement included in its Petition for Writ of Certiorari filed May 10, 2006.

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REPLY TO BRIEF IN OPPOSITION

Crown's argument is simple. As this Court has repeatedly explained, an employer's decision to adopt, modify, amend, or terminate a pension plan is not subject to fiduciary duties under ERISA. *See, e.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999). Merger is a form of *amending* a pension plan, while annuitization and lump-sum distribution are both methods of *terminating* a plan. Mergers and terminations are evaluated according to separate concerns, as different actuarial assumptions govern whether a plan is adequately funded on a termination basis as opposed to an ongoing basis. *See Am. Flint Glass Workers Union v. Beaumont Glass Co.*, 62 F.3d 574, 577 n.4 (3d Cir. 1995). Proposed mergers and terminations are governed by distinct statutory frameworks: merger must only guarantee the short-term protection of pension benefits, while termination must completely satisfy all outstanding benefit claims. *Compare* 29 U.S.C. § 1341 *with* 29 U.S.C. § 1412. Merger is therefore an *alternative to*, not a *method of*, termination, and the decision between the two alternatives does *not* implicate fiduciary duties.

The decision below replaces this rule with a declaration that "anything not forbidden is compulsory": the fact that employers *may* choose to merge pension plans mandates that employers therefore *must* contemplate merger when considering termination. The Ninth Circuit's logic contradicts holdings of this Court and other federal circuits establishing that merger is an *alternative* to a standard termination, and that the decision between merger and annuitiza-

tion is *not* subject to fiduciary duty. This Court should therefore grant Crown's petition for writ of certiorari in order to resolve the now-present circuit split and restore the proper understanding of ERISA's fiduciary duty obligations.

I. THE NINTH CIRCUIT'S DECISION BELOW CREATES A CIRCUIT SPLIT.

Notwithstanding PACE's arguments to the contrary, Br. in Opp. at 8–10, the decision below squarely conflicts with *Malia v. General Electric Co.*, 23 F.3d 828 (3d Cir. 1994) and *Sutter v. BASF Corp.*, 964 F.2d 556 (6th Cir. 1992). *Malia* and *Sutter* are both fundamentally predicated on the categorical understanding that merger is an *alternative to*, not a *method of*, termination.

For example, the *Malia* court expressly compares the entitlements protected during merger with entitlements guaranteed during termination: a necessary analysis, as ERISA defines the former by reference to the latter. 23 F.3d at 831–32 (quoting 29 U.S.C. § 1058). These comparisons would be tautological and meaningless if, as the Ninth Circuit has held, merger is a *method of* termination. *See also id.* at 832 (discussing difference between "hypothetical termination" and "actual termination" in context of validity of merger).

The *Malia* court further states (*after* the passage quoted in Br. in Opp. at 8) that employers have *no* fiduciary duties when considering whether to implement a merger. 23 F.3d 833 This rule brooks no exceptions—merger simply is *not* a fiduciary adminis-

trator decision. *Sutter* adopts a similar categorical rule: merger decisions do not trigger fiduciary obligations because they relate to "the establishment or amendment of a pension plan," not the termination thereof. *See* 964 F.2d at 561–62. The Ninth Circuit's conclusion that Crown violated its fiduciary duties by failing to consider the proposed merger when terminating its plans squarely conflicts with the Third and Sixth Circuits' views.

The categorical view adopted in *Malia* and *Sutter* is amply supported by this Court's prior decisions. In a series of cases, this Court has made clear that the decision to adopt, modify, amend, or terminate a pension plan is not subject to fiduciary responsibilities. *Hughes*, 525 U.S. at 444; *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). Merger is form of plan amendment. *Sutter*, 964 F.2d at 562. Therefore, employers have no fiduciary duties when considering a merger proposal: the Ninth Circuit's decision contradicts *Hughes*, *Lockheed*, and *Curtiss-Wright*.

PACE's denial of this contradiction is unpersuasive, and ultimately supports Crown's argument. According to PACE, the decision below does not conflict with decisions of the other circuits because in *Malia* and *Sutter*, "[t]ermination was never an issue," and "no administrator function was involved." Br. in Opp. at 8–9. This is of course true—because, as Crown has explained, termination is *never* an issue when considering merger, and administrator functions are *never* implicated by merger decisions. "The cases cited by petitioner do not deal with termi-

nation procedures," Br. in Opp. at 9, *because* they deal with merger—which the other circuits maintain is a different process. Only the Ninth Circuit has claimed otherwise. PACE's grounds for distinction only prove Crown's point: that the Ninth Circuit has contradicted its sister circuits.

PACE has not offered a single case supporting the Ninth Circuit's novel view that merger is a form of termination. Meanwhile, the Ninth Circuit's decision conflicts with the Third and Sixth Circuit's treatment of mergers and terminations, and conflicts with this Court's prior holdings. As in *Hughes* and *Lockheed*, this Court should grant certiorari in order to resolve the latest circuit split generated by the Ninth Circuit's novel construction of ERISA. *See* 525 U.S. at 438 (certiorari granted because Ninth Circuit finding of fiduciary duty conflicted with *Lockheed* and sister circuits); 517 U.S. at 890–91 & n.4 (noting conflict between Ninth Circuit finding of fiduciary duty and logic of *Curtis-Wright* as applied by sister circuits).

II. THE NINTH CIRCUIT'S DECISION BELOW DESTABILIZES ERISA LAW IN THE NINTH CIRCUIT.

PACE asserts that merger-as-termination questions rarely arise. *See* Br. in Opp. at 4. That was true enough until this case, which changed the law in the Ninth Circuit. The Ninth Circuit's holding *requires* a course of conduct previously considered *unthinkable* by ERISA practitioners: whenever a plan sponsor undertakes to terminate a plan, the sponsor now has a fiduciary duty to fully consider merger as

means of termination if such a suggestion is made, which must be expected to occur in virtually all instances of termination. Now that the plan sponsor decision of whether or not to merge a pension plan has been transformed into a fiduciary determination of termination procedures, employers will be forced to either carefully sift through unsolicited and unwarranted merger proposals (lest they be accused of violating their fiduciary responsibilities), or to abandon the efficiency gained by serving as both plan sponsor and plan administrator. *See, e.g.*, *California Legal Forms—Transaction Guide* § 1D.52 (Matthew Bender 2006) (citing Ninth Circuit's decision below for proposition that company directors ought *not* to serve as plan administrators).

In response to Crown's argument that the Ninth Circuit decision places the benefits of plan participants at risk, PACE asserts that the argument "verges on the absurd." Br. in Opp. at 17. Nevertheless, the PBGC made that precise argument to Ninth Circuit when urging rehearing en banc. *See* PBGC Amicus Curiae Br. at 4 (under a merger, "benefit liabilities remain unsatisfied promises, and participants continued to be at risk that they will not receive their full benefits, depending on a plan's funding levels."). In termination by purchase of an annuity, plan members immediately receive their benefits—in the form of the annuity—whereas merger merely represents the continuation of a promise to pay. Merger simply does not *guarantee* plan benefits.

III. THE NINTH CIRCUIT'S DECISION BELOW IGNORES THE STRUCTURE OF ERISA.

PACE, like the Ninth Circuit, rests its argument that termination may be effected by merger on 29 U.S.C. § 1341(b)(3)(A), which provides that "in connection with any final distribution of assets pursuant to the standard termination of the plan under this subsection," the plan administrator shall either "(i) purchase an irrevocable commitment from an insurer to provide all benefit liabilities under the plan, or (ii) . . . otherwise fully provide benefit liabilities under the plan." PACE argues here, and the Ninth Circuit held below, that the words "otherwise fully provide" leave open the possibility of merger as a method of plan assets. *See* Br. in Opp. at 21.

This wooden literalism focuses on a single statutory phrase and ignores the context of ERISA's structure. Statutory language "must be read in context and a phrase 'gathers meaning from the words around it.'" *Jones v. United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). Merger and termination are different processes, defined by separate sections of ERISA and designed to serve divergent purposes. *See* Pet. at 17–23. Federal law goes so far as to define the two by contrast to each other: a merger's validity under 29 U.S.C. § 1058 is predicated on whether the post-merger plan, were it immediately terminated, would grant each participant the same benefits as would a termination of the pre-merger plan. *See Malia*, 23 F.3d at 831–32. If merger is a

form of termination, this statutory framework is nonsensical.

The entire point of termination is finality: termination ends a plan's existence for ERISA purposes. The plan's benefits leave the ERISA framework, secured by an external source guaranteeing long-term stability. The employer has no further ongoing obligations. The PBGC is no longer involved in overseeing the plan. Former plan participants need not worry about their benefits deteriorating after poor decisions by plan administration.

Merger achieves none of these results. Instead, merger's only guarantee is of short-term equivalency: the termination value of a plan immediately after a merger must surpass or equal the termination value of the plan immediate before merger. 29 U.S.C. § 1058; *see also* 29 U.S.C. § 1412(b). The long-term stability of a merged plan hinges on continual plan management and oversight—the very thing that "termination" is supposed to end. Merger therefore cannot be said to satisfy 29 U.S.C. § 1341(b)'s requirement that a termination "fully provide all benefit liabilities," because merger does not provide the long-term guarantee of full benefit protection achieved through annuitization or lump-sum disbursement.

PACE's response—that annuities are not risk-free, and therefore that merger is a form of termination—is unsupportable. *See* Br. in Opp. at 17, 19–23. *First*, as PACE concedes, merger does not actually *terminate* a plan. Br. in Opp. at 20. Although benefits under a termination annuity and benefits under

an ongoing plan are both paid out over time, the absence of an ongoing ERISA-regulated plan is a critical distinction between the two.

Second, merger simply does not provide the degree of long-term security that annuitization or lump-sum distribution guarantees. Annuitization provides for the protection of all participant benefits at the moment of termination, through the purchase of a fully-funded and reliable financial instrument. Lump-sum distribution achieves the same goal by transferring the entire value of the accrued benefit directly to the participant, at the moment of termination. Merger, by contrast, relies on the future management of an ongoing pension plan to provide future benefits. The guarantee that "no accrued benefit of a participant or beneficiary may be lower *immediately after* the effective date of a transfer or merger" cannot be said to fully guarantee such benefits through the future. *See* 29 U.S.C. § 1412(b) (emphasis added). Merger does not *prospectively* protect plan benefits, because the benefits are at the mercy of future plan administration.

Third, though annuities have a theoretical chance of insolvency, Br. in Opp. at 17, they nevertheless offer more security than ongoing pension plans. Section 1341 reflects the traditional, historical view of annuitization as a risk-free guarantee of future benefits—annuity instability is a recent development, far less prevalent than pension plan bankruptcy. Regardless, even if PACE's objections to annuitization were valid, § 1341 specifically approves of annuitization as a form of termination, while

PACE's merger-as-termination theory lacks any express statutory blessing.

The PBGC opinion letters relied upon by PACE are not to the contrary. *See* Br. in Opp. at 14–17, App. 6a–16a. Nothing prevents employers from *first* making the non-fiduciary decision to partially merge or split Plan A into Plan B, and *then* making the non-fiduciary decision to terminate the remains of Plan A. The PBGC Implementation Guidelines identified by PACE note that such two-step merger/termination processes will be carefully scrutinized to prevent abuse, while the Opinion Letters note a few cases in which a specific merger/termination process would be deemed acceptable.

These letters ultimately *support* Crown's argument that merger and termination are each plan sponsor decisions not subject to fiduciary duties. In each letter, the merger and termination are treated as separate non-fiduciary decisions: nothing in these letters establishes that a merger is a *form* of termination. Instead, the two-step plan is considered an attempt to *avoid* the rules governing proper plan termination. At most, the Opinion Letters establish that Crown *could* have elected to adopt PACE's merger proposal, but the fact that the process would be appropriate in some cases does not create a fiduciary obligation to consider it whenever it is offered.

PACE further obscures the merger/termination distinction by trying to stretch an employer's specific fiduciary-duties-as-administrator to cover *every* decision made by an employer who occasionally acts an administrator. Because the employer is wearing two

hats, PACE argues, it *always* is subject to its fiduciary duties to investigate proposed options. Br. in Opp. at 5–8. This assertion is untenable, as a sponsor can only wear one hat at a time: "the fiduciary with two hats *wear[s] only one at a time*, and wear[s] the fiduciary hat when making fiduciary decisions." *Pegram v. Herdich*, 530 U.S. 211, 225 (2000) (emphasis added). Because merger concerns plan structure or design, the plan sponsor simply does not wear its *fiduciary* hat when it makes a decision concerning merger.

CONCLUSION

For the reasons provided above and in the petition for writ of certiorari, this Court should grant the petition.

Respectfully submitted,

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In the Supreme Court of the United States

JEFFREY H. BECK, LIQUIDATING TRUSTEE OF THE ESTATES OF CROWN VANTAGE, INC., AND CROWN PAPER COMPANY, PETITIONER

v.

PACE INTERNATIONAL UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an employer that sponsors and administers a single-employer defined benefit plan has a fiduciary obligation under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, to consider merger as a way to implement the employer's decision to terminate the plan.

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In the Supreme Court of the United States

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JEFFREY H. BECK, LIQUIDATING TRUSTEE OF THE ESTATES OF CROWN VANTAGE, INC., AND CROWN PAPER COMPANY, PETITIONER

v.

PACE INTERNATIONAL UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, sets minimum standards for employee benefit plans to ensure their equitable character and financial soundness. See 29 U.S.C. 1001(a). Among those standards are requirements that plan fiduciaries discharge their duties solely in the interest of plan participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries, with prudence, and in accordance with the documents and instruments governing the plan insofar as they are consistent with ERISA. 29 U.S.C. 1104(a)(1)(A), (B) and (D). In general, a person is a fiduciary "to the extent" he exercises "discretionary authority or discretionary control" over plan "management," exercises "au-

thority or control" over plan "assets," or has "discretionary authority or discretionary responsibility" in the plan's "administration." 29 U.S.C. 1002(21)(A)(i) and (iii).

One kind of pension plan governed by ERISA is a defined benefit plan. 29 U.S.C. 1002(35). In a defined benefit plan, employees are entitled, upon retirement, to fixed periodic payments. See *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 439 (1999). To ensure the availability of sufficient funds to make those payments, ERISA sets minimum funding standards for defined benefit plans. 29 U.S.C. 1001(c), 1081(a), 1082. Title IV of ERISA, 29 U.S.C. 1301 *et seq.*, also provides an insurance program, administered by the Pension Benefit Guaranty Corporation (PBGC), to protect plan participants and beneficiaries from loss of certain promised benefits upon plan termination. See 29 U.S.C. 1001(c); *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 361-362 (1980).

An employer may initiate termination of a single-employer defined benefit plan "only" through "standard" or "distress" termination procedures prescribed in Title IV of ERISA. 29 U.S.C. 1341(a)(1). This case concerns a standard termination. In a standard termination, the plan administrator must provide advance notice to affected parties, actuarial information indicating to the PBGC that the plan's assets will be sufficient to satisfy benefit liabilities, subsequent notice to each participant and beneficiary of the amount of benefit liabilities attributable to him or her, and additional information required by PBGC regulations. 29 U.S.C. 1341(a)(2), (b)(1)(A) and (B), (b)(2); 29 C.F.R. 4041.23-4041.27. The PBGC then decides whether the plan has sufficient assets to satisfy all benefit liabilities and whether other requirements have been met. See 29 U.S.C. 1341(b)(2)(C); 29 C.F.R. 4041.31. If the PBGC does not issue a notice of noncompliance, and if the plan assets are sufficient to satisfy benefit liabilities on the termina-

tion date, the plan administrator makes a final distribution of plan assets. 29 U.S.C. 1341(b)(2)(D); 29 C.F.R. 4041.28.

Pursuant to 29 U.S.C. 1341(b)(3)(A), the plan administrator must "distribute" the assets of the plan "in accordance with" 29 U.S.C. 1344, which allocates the assets "among the participants and beneficiaries of the plan" in a specified order of priority. 29 U.S.C. 1344(a). If assets are left over after benefits are satisfied, any assets attributable to employee contributions must be distributed to the participants who made the contributions or to their beneficiaries. 29 U.S.C. 1344(d)(3). After that distribution, the employer sponsoring the plan may recover any residual assets if the plan so provides and the distribution does not violate any law. 29 U.S.C. 1344(d)(1); see *Mead Corp.* v. *Tilley*, 490 U.S. 714, 717-718 (1989). To distribute the assets, the plan administrator must either "purchase irrevocable commitments [*i.e.*, annuities] from an insurer to provide all benefit liabilities under the plan," or, "in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan." 29 U.S.C. 1341(b)(3)(A).

The PBGC's regulations similarly require the plan administrator, "in accordance with all applicable requirements under the [Internal Revenue] Code and ERISA," to "distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer or in another permitted form." 29 C.F.R. 4041.28(c)(1). The regulations stress that "[a] plan administrator violates ERISA if plan assets are allocated or distributed upon plan termination in a manner other than that prescribed in [29 U.S.C. 1344]." 29 C.F.R. 4044.4(a). The regulations also impose various other requirements, including that the plan administrator inform each participant and beneficiary that, after distribution of plan assets, "the PBGC no longer guarantees that participant's or beneficiary's plan benefits." 29 C.F.R. 4041.23(b)(9).

2. a. Crown Vantage, Inc., and its subsidiary Crown Paper Co. (collectively Crown) operated paper mills. Crown's board of directors served as administrator of Crown's 18 pension plans. PACE International Union (PACE) represented employees covered by seventeen of the plans. Pet. App. 2, 4.

In March 2000, Crown filed for bankruptcy and began liquidating its assets. In July 2001, Crown's board of directors began to consider terminating its pension plans under a standard termination through the purchase of annuities. Pet. App. 4. PACE proposed that Crown instead merge the plans covering employees represented by PACE with the PACE Industrial Union Management Pension Fund (PIUMPF), a multiemployer plan. *Id.* at 5; see 29 U.S.C. 1002(37), 1301(a)(3) (defining "multiemployer plan"). Crown's board of directors decided to terminate twelve of the plans (which, by then, had been combined into a single plan) by purchasing annuities. Crown paid $84 million for the annuities, with the expectation that, after termination and distribution of the annuity contracts to participants and beneficiaries, approximately $5 million would revert to Crown. Pet. App. 5-7.

b. After Crown purchased the annuities, respondents PACE and two plan participants brought an adversary action against Crown in bankruptcy court. Pet. App. 7; see 28 U.S.C. 157. Respondents alleged that Crown had breached its fiduciary duties under ERISA by failing to give adequate consideration to PACE's merger proposal. Pet. App. 7.

The bankruptcy court agreed with respondents that Crown had breached its fiduciary duties. Pet. App. 51-73. The court acknowledged that the board of directors' decision to terminate the plan was a "business" rather than a fiduciary decision. *Id.* at 65. The court nonetheless reasoned that the decision whether to "annuitize" the plan or to merge it into PIUMPF was a fiduciary decision. *Id.* at 66. And the court

found that the board did not seriously consider the proposed merger with PIUMPF. *Id.* at 65.

The court did not, however, order Crown to cancel the annuity purchase, because that would have triggered a $4 million penalty for breach of the purchase agreement. Pet. App. 61, 66-67. Instead, the court issued a preliminary injunction preventing Crown from recovering the $5 million in surplus plan assets remaining after the annuity purchase. *Ibid.* In later decisions, the court kept that injunction in effect, but approved termination of the plan and distribution of the residual assets to the participants and beneficiaries. *Id.* at 74-83. The distribution of the residual assets was stayed pending resolution of any appeals. See Pet. 9.

c. Petitioner, the liquidating trustee of the Crown bankruptcy estates, appealed to the district court, which affirmed the bankruptcy court's order. Pet. App. 29-50. The district court rejected petitioner's argument that the decision to terminate the plan by purchasing annuities rather than to merge the plan with PIUMPF was a business, rather than a fiduciary, decision. *Id.* at 45-48. The Court reasoned that merger is an alternative method, permitted by ERISA, of implementing a termination because a merger can "otherwise fully provide all benefit liabilities under the plan." *Id.* at 46 (quoting 29 U.S.C. 1341(b)(3)(A)(ii)). The court also rejected petitioner's contention that the terms of the Crown plan did not permit merger as a method of termination. *Id.* at 47.

d. Petitioner appealed, and the Ninth Circuit affirmed the district court's judgment in relevant part. Pet. App. 1-24. The court of appeals acknowledged that "the decision to terminate a pension plan is a business decision not subject to ERISA's fiduciary obligations." *Id.* at 9. The court stated, however, that "the *implementation* of a decision to terminate is discretionary in nature and subject to ERISA's fiduciary obligations." *Ibid.* (citing *Waller* v. *Blue Cross*, 32 F.3d 1337,

1342-1344 (9th Cir. 1994)). The court then reasoned that whether Crown breached its fiduciary duty turns on whether merger was a permissible means of implementing the decision to terminate the plan. *Ibid.*

The court concluded that merger was a permissible way to implement plan termination. In reaching that conclusion, the court refused to consider whether the terms of the Crown plan permitted merger as a means of termination, because Crown had not raised the issue in the bankruptcy court. Pet. App. 10. Turning to the provisions of ERISA and the PBGC's regulations, the court construed 29 U.S.C. 1341(b)(3)(A) and 29 C.F.R. 4041.28(c)(1) to permit any method of termination, including merger, that is "sufficient to cover plan liabilities." Pet. App. 12. The court rejected petitioner's arguments that merger is a procedure distinct from termination and that merging the Crown plan into PIUMPF would not "distribute" plan assets as required by Section 1341(b)(3). *Id.* at 12-14.

The court next concluded that Crown breached its fiduciary duty to act solely in the interest of plan participants and beneficiaries by failing to undertake an intensive and scrupulous investigation of the proposed PIUMPF merger as an alternative to the purchase of annuities. Pet. App. 15-20. In a separate, unpublished opinion, the court upheld the bankruptcy court's ordered distribution of residual plan assets as a remedy for Crown's fiduciary breach. *Id.* at 25-28.

e. Petitioner sought rehearing and rehearing en banc. The PBGC and the Department of Labor filed amicus briefs in support of petitioner's request, but the court of appeals denied further review. Pet. App. 84-85.

DISCUSSION

The decision of the court of appeals seriously misconstrues ERISA. It disregards the distinction this Court has consistently drawn between settlor and fiduciary functions,

and it is in significant tension with decisions of other courts of appeals that have adhered to that distinction. The court of appeals' decision also imposes substantial burdens on plan sponsors, plan participants and beneficiaries, and the PBGC. This Court's review is therefore warranted.

A. The Decision Of The Court Of Appeals Is Incorrect

The court of appeals misinterpreted ERISA in two important respects. First, the court erroneously held that ERISA's fiduciary duties apply to an employer's decision whether to terminate a pension plan by purchasing annuities or instead to merge the plan with another plan. Second, the court further erred in holding that merger is a permissible means of terminating a defined benefit pension plan.

1. ERISA draws a fundamental distinction between settlor and fiduciary functions. Decisions about the design, composition, and structure of pension plans are settlor functions, which plan sponsors may make based on business considerations. Decisions about the administration and management of plan assets are fiduciary functions, which must be made in the best interests of plan participants and beneficiaries. An employer's choice between terminating a plan by purchasing annuities and merging the plan with another plan is a decision about plan design, composition, and structure. That decision is therefore a settlor function that is not subject to ERISA's fiduciary duties.

a. This Court has repeatedly recognized the distinction between settlor and fiduciary functions. The Court first discussed it in *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73 (1995), which held that a provision in a welfare plan stating that the sponsor could amend the plan at any time was valid under ERISA § 402(b)(3), 88 Stat. 875 (29 U.S.C. 1102(b)(3)). In reaching that holding, the Court noted that "[e]mployers or other plan sponsors are generally free under ERISA, for

any reason at any time, to adopt, modify, or terminate welfare plans." 514 U.S. at 78. The Court explained that employers do not act as fiduciaries when taking those actions. *Ibid.*

The Court applied that principle to a pension plan in *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996). *Spink* held that Lockheed did not breach any fiduciary duty under ERISA when it amended its retirement plan for business reasons. *Id.* at 889-891. Relying on *Curtiss-Wright*, the Court stated that "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." *Id.* at 890. The Court explained that "amending or terminating a plan" involves "plan design" rather than "plan 'management' or 'administration.'" *Id.* at 890 (citations omitted).

The Court provided further elaboration in *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432 (1999). In that case, the Court held that claims that Hughes breached its fiduciary duties in amending its pension plan were "directly foreclosed by *Spink*'s holding that, without exception, '[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries.'" 525 U.S. at 445 (quoting *Spink*, 517 U.S. at 890). The Court explained that, "[i]n general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets." *Id.* at 444. Thus, "ERISA's fiduciary duty requirement simply is not implicated where" an employer, acting as a plan's "settlor, makes a decision regarding the form or structure of the [p]lan." *Ibid.*

b. The distinction between settlor and fiduciary functions follows from ERISA's definition of fiduciary. See *Spink*, 517 U.S. at 890. As relevant here, ERISA provides that a person is a plan fiduciary "to the extent * * * he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control

respecting management or disposition of its assets," or "has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. 1002(21)(A)(i) and (iii). Thus, a person is a fiduciary under ERISA "only when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management and administration." *Spink*, 517 U.S. at 890 (citation omitted). Those functions do not include plan design, composition, or structure. *Ibid.*; *Hughes Aircraft*, 525 U.S. at 444.

The limitations on the scope of ERISA's fiduciary duties reflect the statute's basic requirements and purposes. ERISA does not require employers to create benefit plans or to provide any particular kind or level of benefits. See *Spink*, 517 U.S. at 887; *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983). ERISA therefore generally allows employers to decline to adopt, to alter, or to terminate benefit plans for any reason, including the employers' business interests.

ERISA does seek to *encourage* plan formation and the provision of benefits, 29 U.S.C. 1001a, 1001b, and the employers' freedom to alter or to terminate plans furthers those goals. It reassures employers that they retain substantial authority over the structure of and the benefits provided by the plans that they create.

ERISA also seeks to ensure that employees receive the benefits that they have been promised by employers. *Spink*, 517 U.S. at 887; *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 375 (1980); 29 U.S.C. 1001(b) and (c). For that reason, ERISA requires that decisions about the administration and management of existing plans be made "solely in the interest of the participants and beneficiaries." 29 U.S.C. 1104(a)(1)(A).

c. The court of appeals' decision cannot be squared with the distinction between settlor and fiduciary functions. An employer's decision whether to terminate a pension plan is a settlor action. *Spink*, 517 U.S. at 890; *Curtiss-Wright*, 514

U.S. at 78. It "cannot be an action of plan 'management' or 'administration.'" *Spink*, 517 U.S. at 890 (citation omitted). Rather, it is a decision whether fundamentally to alter the plan's design, composition, and structure by ending the plan altogether. An employer's decision whether to merge a pension plan with another plan is likewise a settlor action. Like the decision to terminate a plan, the decision to merge plans is a decision about the design, composition, and structure of the plans. The courts of appeals that have considered the question have therefore refused to impose ERISA's fiduciary obligations on employer decisions to merge plans. See *Malia* v. *General Elec. Co.*, 23 F.3d 828, 833 (3d Cir.), cert. denied, 513 U.S. 956 (1994); *Sutter* v. *BASF Corp.*, 964 F.2d 556, 562 (6th Cir. 1992).

Because an employer's decision whether to terminate a plan and its decision whether to merge a plan with another plan are, considered separately, settlor rather than fiduciary functions, it follows that the choice between the two is also a settlor function. That choice is necessarily a decision about plan design, composition, and structure. Thus, Crown's decision whether to terminate its pension plan by purchasing annuities or instead to merge it with PACE's multiemployer plan was not a fiduciary decision. It was a settlor decision that Crown was free to make for business reasons.

d. The court of appeals mistakenly concluded that Crown had a fiduciary duty to consider merger on the theory that merger was a possible means of implementing Crown's decision to terminate the plan. As discussed below, the court was incorrect in concluding that merger is a method of plan termination. See pp. 11-16, *infra*. Even apart from that error, however, the court was incorrect in concluding that the choice between terminating a plan by purchasing annuities and merging the plan with another plan is a fiduciary decision.

The court of appeals incorrectly analogized that decision to choosing between two insurance companies to provide annuities upon termination. See Pet. App. 9 (citing *Waller* v. *Blue Cross*, 32 F.3d 1337, 1342-1344 (9th Cir. 1994)). The choice between two annuity providers is a fiduciary decision because it is a decision about how to expend plan assets. See 29 C.F.R. 2509.95-1; *Waller*, 32 F.3d at 1342-1343. But an employer's choice whether to merge a plan with another plan—like an employer's choice between two potential merger partners—is not a decision about how to expend or otherwise manage or administer plan assets. It is, as described above, a decision about plan design, composition, and structure. That decision is not transformed into a fiduciary act simply because it is (mis)characterized as a method of implementing a plan termination. It remains a settlor rather than a fiduciary function, however it is labeled.

2. The court of appeals also erred in holding that merger is a permissible method of terminating a defined benefit plan. ERISA's provisions governing plan termination and the PBGC's implementing regulations establish that merger is not a means of accomplishing plan termination. Instead, merger is a separate and distinct procedure that plan sponsors may use to alter the structure or composition of a plan.

a. As this Court noted in *Hughes Aircraft*, 29 U.S.C. 1341 provides the exclusive means for voluntary termination of a single-employer defined benefit plan. See 525 U.S. at 446. Section 1341(b), which governs the standard termination involved here, makes clear that merger is not a permissible method of effectuating termination. It states that, in a termination, plan assets must be distributed "in accordance with [29 U.S.C. 1344]." 29 U.S.C. 1341(b)(3)(A). A merger does not comply with the requirements of Section 1344.

Section 1344(a) requires that the assets of the terminating plan be allocated "among the participants and beneficiaries of

the plan." 29 U.S.C. 1344(a). In a merger, however, assets are not allocated among the participants and beneficiaries of the terminating plan. Instead, they are transferred to the merged plan. Moreover, once they have been transferred, the assets are used to satisfy the benefit claims not only of the participants and beneficiaries of the terminating plan, but also of the other participants and beneficiaries of the merged plan. See 26 C.F.R. 1.414(*l*)-1(b)(1) and (2).

Section 1344(a) also sets out a specific order of priority for the allocation of assets. See 29 U.S.C. 1344(a); *Mead Corp.* v. *Tilley*, 490 U.S. 714, 717-718 & n.3 (1989). That allocation priority is not followed in a merger. Instead, the assets of the merging plans are combined and commingled to provide for the benefits of all participants in the merged plan. See 26 C.F.R. 1.414(*l*)-1(b)(1) and (2); *Hughes Aircraft*, 525 U.S. at 440 (noting that, in a defined benefit plan, "no plan member has a claim to any particular asset that composes a part of the plan's general asset pool").

In addition, Section 1344(d) provides that, if all benefits are satisfied, there may in some circumstances be a reversion or distribution of residual assets to the employer.[1] In a merger, however, there is no possibility of a reversion to the employer. The plan assets are all transferred to the merged plan. And, once the assets are in the merged plan, they are subject to ERISA's anti-inurement rule, which prohibits their use for the benefit of the employer. See 29 U.S.C. 1103(c).[2]

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[1] Section 1344(d) permits a reversion if all benefit liabilities have been satisfied, the plan allows the reversion, and the reversion does not contravene any provision of law. 29 U.S.C. 1344(d)(1). Section 1344(d)(3) further requires that, after all benefits are satisfied and before any reversion, any assets of the plan attributable to employee contributions be distributed to the participants who made the contributions or their beneficiaries. 29 U.S.C. 1344(d)(3).

[2] Respondents incorrectly assert (Br. in Opp. 22) that PBGC Opinion Letter 85-25 (Oct. 11, 1985) (Br. in Opp. App. 14a-16a) allows a reversion of assets following a merger. The letter says that 1984 Joint Guidelines issued by the

b. Section 1341(b) also requires distribution of the assets of a terminating plan to be accomplished by the purchase of annuities or by "otherwise fully provid[ing] all benefit liabilities" "in accordance with the provisions of the plan and any applicable regulations." 29 U.S.C. 1341(b)(3)(A). Thus, any alternative method of distributing assets must be authorized by the PBGC's regulations. The PBGC does not view its regulations as authorizing merger as an alternative method of asset distribution. The PBGC's interpretation of its regulations is reasonable and entitled to deference. See *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); *Boivin* v. *U.S. Airways, Inc.*, 446 F.3d 148, 154 (D.C. Cir. 2006).[3]

PBGC, the Department of Labor, and the Internal Revenue Service (IRS) generally do not apply to a transfer of assets and liabilities from a single-employer plan to an ongoing multiemployer plan followed by the termination of the single-employer plan. The letter makes clear, however, that "[a] valid plan termination is a prerequisite to a reversion of surplus plan assets to an employer." *Id.* at 15a. The other PBGC letters cited by respondent (Br. in Opp. 15-16) address circumstances under which an employer can split a plan into two plans, terminate one plan, and obtain a reversion. PBGC Op. Ltr. 85-11 (May 14, 1985) (Br. in Opp. App. 6a-9a); PBGC Op. Ltr. 85-21 (Aug. 26, 1985) (Br. in Opp. App. 10a-13a). None of the letters suggests that an employer may obtain a reversion without following termination procedures, including distribution of the assets of the terminating plan by purchasing annuities or by another method that complies with all statutory and regulatory requirements.

[3] The Crown plan also did not authorize merger as a means of distributing assets. See C.A. E.R. 386 (providing that "distributions" upon termination "may be effectuated in the discretion of the Plan Administrator by the purchase of nontransferable annuities, or by continuing the [Plan] in existence, or by a cash settlement with any Member with the Member's consent"). The court of appeals refused to consider the plan terms because it reasoned that petitioner had waived reliance on them by failing to invoke them in the bankruptcy court. Pet. App. 10. That was error, because whatever transpired in the bankruptcy court, the district court considered the plan terms on appeal. Moreover, the plan's failure to provide for merger as a method of distribution was not a defense subject to waiver by petitioner if he did not raise it. Because ERISA authorizes distribution by means other than the purchase of annuities only if the alternative distribution method is specified in the plan, 29 U.S.C. 1341(b)(3)(A)(ii), respondents bore the burden of proving that the plan

The PBGC's regulations require distribution of the assets of the terminating plan "in accordance with all applicable requirements under * * * ERISA," 29 C.F.R. 4041.28(c)(1), and, in particular, the allocation requirements of Section 1344, 29 C.F.R. 4044.4(a). As explained above, merger does not result in distribution in accordance with those requirements.

The regulations also require the administrator to "distribute plan assets in satisfaction of all plan benefits." 29 C.F.R. 4041.28(c)(1). The PBGC interprets that distribution requirement to contemplate that (1) the assets will be divided among the participants and beneficiaries of the terminating plan, and (2) those participants and beneficiaries will actually receive their benefits, either through an annuity, which is the distribution form authorized by the statute, or through a lump sum payment equal to the present value of the benefits. See 29 C.F.R. 4041.28(c)(1) and (2); note 5, *infra*.[4]

Those criteria are not satisfied in a merger. Instead, as described above, the assets are transferred to the new merged plan, where they are used to provide benefits to other individuals besides the participants and beneficiaries of the terminating plan. In addition, participants and beneficiaries do not actually receive their benefits in the form of annuity contracts or cash. Rather, they receive only the promise of future payments from the merged plan—payments which, unlike lump sum distributions or annuities, are contingent on the continued health of that plan.

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authorized merger as a distribution method. Petitioner had no obligation to disprove that fact, which was an essential element of respondents' claim that failure to consider merger was a breach of fiduciary duty. See *Schaffer ex rel. Schaffer* v. *Weast*, 126 S. Ct. 528, 534 (2005) (the general rule is that "plaintiffs bear the burden of persuasion regarding the essential aspects of their claims").

[4] In order to avoid taxation, a participant or beneficiary may elect to have his or her lump sum payment transferred or "rolled over" into an individual retirement account (IRA) or another qualified plan. 26 U.S.C. 402(c) (2000 & Supp. III 2003).

Other components of the PBGC's regulations reinforce the conclusion that merger is not a permissible method of accomplishing plan termination. For example, the regulations require that the notice of plan termination inform each participant that, after distribution of the plan assets, "the PBGC no longer guarantees that participant's or beneficiary's plan benefits." 29 C.F.R. 4041.23(b)(9). But a merger does not extinguish the PBGC's guarantee. Instead, the PBGC continues to guarantee benefits under the new merged plan.[5]

c. The structure of ERISA confirms that merger is not simply a method of terminating a plan. ERISA treats merger and termination as separate and distinct procedures. Mergers are addressed in separate statutory sections from terminations. Compare 29 U.S.C. 1058 (mergers generally), 29 U.S.C. 1411, 1412 (mergers involving multiemployer plans), and 26 U.S.C. 414(*l*) (tax implications of mergers) with 29 U.S.C. 1341 (terminations of single-employer plans) and 29 U.S.C. 1341a (terminations of multiemployer plans).

Moreover, the statutory provisions addressing mergers impose different requirements from those applicable to terminations. For example, the merger provisions generally require that participants' benefits be no lower after a merger than they were before the merger. See 29 U.S.C. 1058, 1411(b)(2), 1412(b). Those provisions do not, however, give

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[5] The court of appeals incorrectly concluded that the PBGC's regulations authorize merger as a method of plan termination because they allow distribution of assets in a termination to be effected by the purchase of annuities "or in another permitted form." 29 C.F.R. 4041.28(c)(1). The phrase "another permitted form" refers to a lump sum cash distribution, if permitted by the plan, or the rollover of such a distribution into an IRA or an other qualified plan. See p. 14 & note 4, *supra*. The phrase could conceivably encompass a distribution method other than a lump sum payment if that method was permitted by the relevant plan, ERISA, and the PBGC's regulations and provided the same degree of assurance that participants and beneficiaries would receive their promised benefits. Merger, however, meets none of those criteria.

participants the same rights to receive plan assets that the participants have in a plan termination. See, *e.g.*, *Brillinger* v. *General Elec. Co.*, 130 F.3d 61, 63 (2d Cir. 1997), cert. denied, 525 U.S. 1138 (1999), and *Malia*, 23 F.3d at 831-832 (discussed at p. 17, *infra*). In addition, a plan administrator cannot begin a termination without providing notice to the PBGC. The PBGC can then block the termination if it finds that assets will not be sufficient to provide for benefit liabilities. 29 U.S.C. 1341(b)(2)(C) and (D). The PBGC has no comparable authority to block a merger, and it may not even receive notice of a merger until after it is completed. See 29 U.S.C. 1343(a), 1343(c)(8) (requiring notice after merger); compare 29 U.S.C. 1411(b) (advance notice required for merger of multiemployer plans) with 29 U.S.C. 1412 (no advance notice required for merger of single-employer plan into multiemployer plan).

B. This Court's Review Is Warranted

1. This Court should grant review because the Ninth Circuit's decision departs significantly from the teaching of the Court's cases. As explained above, in *Curtiss-Wright*, *Spink*, and *Hughes Aircraft*, this Court drew a clear distinction between settlor and fiduciary functions. See pp. 7-8, *supra*. Those cases establish that decisions about plan design, composition, and structure are settlor functions that are not subject to ERISA's fiduciary requirements. See *Curtiss-Wright*, 514 U.S. at 78; *Spink*, 517 U.S. at 890-891; *Hughes Aircraft*, 525 U.S. at 444-445. The choice between terminating a plan by purchasing annuities and merging the plan with another plan is plainly a decision about plan design, composition, and structure. The holding of the court of appeals that the decision is nonetheless subject to ERISA's fiduciary requirements cannot be reconciled with the principles set out in *Curtiss-Wright*, *Spink*, and *Hughes Aircraft*.

The decision below is also in significant tension with decisions of other courts of appeals. Consistent with this Court's rulings, two courts of appeals have held that an employer's decision to merge pension plans is not a fiduciary decision. See *Malia*, 23 F.3d at 833; *Sutter*, 964 F.2d at 562. Other courts of appeals have held that decisions by an employer to "spin off" part of a plan or to transfer assets and liabilities from one plan to another plan, which are similar to mergers, are not fiduciary decisions.[6] See, *e.g.*, *Flanigan* v. *General Elec. Co.*, 242 F.3d 78, 87-88 (2d Cir.), cert. denied, 534 U.S. 1065 (2001); *King* v. *National Human Res. Comm., Inc.*, 218 F.3d 719, 723-724 (7th Cir. 2000); *Systems Council EM-3* v. *AT&T Corp.*, 159 F.3d 1376, 1379-1380 (D.C. Cir. 1998). The Ninth Circuit's decision cannot be reconciled with the reasoning of those cases because it treats an employer's decision not to transfer assets through a merger as a fiduciary decision.

The Ninth Circuit's decision is also in tension with decisions of other courts of appeals holding that, in a merger, plan participants do not have the same rights to plan assets that they would have in a termination. See *Brillinger*, 130 F.3d at 63 (holding that plan participants affected by a merger do not have a right to have their accrued benefits increased by the share of the residual assets that they would have received in a plan termination under 29 U.S.C. 1344(d)(3)); *Malia*, 23 F.3d at 831-832 (same). *Brillinger* and *Malia* recognize that merger and termination are alternative settlor options that entail distinct procedures, are subject to distinct requirements, and trigger distinct rights for plan participants. The decision

[6] A merger is a combining of two plans into one plan, while a transfer of assets and liabilities occurs when there is a diminution of assets in one plan and the acquisition or assumption of them by another plan. 26 C.F.R. 1.414(*l*)-1(b)(2) and (3). A "spinoff" means splitting one plan into two plans. 26 C.F.R. 1.414(*l*)-1(b)(4). A transfer of assets and liabilities is treated as a combination of a merger and a spinoff, *e.g.*, assets and liabilities are spun off from one plan and then combined with another plan. 26 C.F.R. 1.414(*l*)-1(*o*).

below, in contrast, incorrectly treats merger as a mere method of implementing plan termination rather than an alternative to termination and a separate procedure.

2. This Court's review is also warranted because the decision below is likely to cause significant harm to plan sponsors, plan participants and beneficiaries, and the PBGC.

a. Plan sponsors in the Ninth Circuit will be harmed by the court of appeals' decision. If employers have a fiduciary duty to consider merger as an alternative to terminating plans by purchasing annuities, they will not be free to choose termination even when it makes business sense. In particular, they may be precluded from terminating over-funded plans in order to recoup excess plan assets. The court of appeals' decision therefore imposes substantial burdens on the freedom of employers in the Ninth Circuit to operate their businesses.

More fundamentally, because the decision below impedes employers from obtaining reversions from over-funded plans, it is likely to undermine ERISA's goal of promoting adequate funding of pension plans. The authority to recover residual assets reassures employers that they will be able to recoup their money if they provide plans with more resources than the plans ultimately need. That authority thus encourages adequate plan funding. Depriving employers of that authority, in contrast, deprives them of the assurance that they can recoup any over-funding and therefore creates an incentive for employers to minimize the amount that they contribute to their plans. See *Hawkeye Nat'l Life Ins. Co.* v. *Avis Indus. Corp.*, 122 F.3d 490, 502 n.7 (8th Cir. 1997); *Chait* v. *Bernstein*, 835 F.2d 1017, 1027 (3d Cir. 1988).

b. The court of appeals' decision could also harm plan participants and beneficiaries in the Ninth Circuit. In the judgment of the PBGC and the Department of Labor, the purchase of annuity contracts from a financially sound insurance company provides the best assurance (other than lump-

sum payments) that plan participants and beneficiaries will receive the full benefits to which they are entitled. That is particularly true because, in the view of the Department of Labor, an employer that terminates a pension plan by purchasing an annuity contract generally has a fiduciary duty to obtain the safest annuity available. 29 C.F.R. 2509.95-1(c). When a plan is merged rather than terminated by the purchase of annuities, participants and beneficiaries face a greater risk that they will not receive their full benefits. The merger provides them only a promise of future benefits under the merged plan, the payment of which is contingent on the continued health of that plan. The added risk to participants and beneficiaries is particularly great in the type of merger involved in this case—merger of a single-employer plan into a multiemployer plan. Although the PBGC continues to guarantee benefits under the multiemployer plan, the PBGC's guarantee is substantially less than under the single-employer plan. Compare 29 U.S.C. 1322 with 29 U.S.C. 1322a; see PBGC, *Annual Management Report, Fiscal Year 2006*, at 12-13 (Nov. 15, 2006) <http://www.pbgc.gov/docs/PBGCAMR.pdf> (PBGC Report).

c. Finally, if certiorari is not granted, the PBGC will be harmed by the court of appeals' decision because it will have to administer different termination regimes in different parts of the country. In the Ninth Circuit, the PBGC will have to accept merger as a method of distributing assets in a termination. In the remainder of the country, however, merger will remain an impermissible method of effectuating a termination, in accordance with the PBGC's regulations, correctly interpreted.

The PBGC will also be harmed because it will have to continue to insure some plans that would have terminated and satisfied their full benefit liabilities but are instead required under the Ninth's Circuit's rule to merge with other plans.

Despite some improvement in the PBGC's financial condition in the past two years, existing plans are massively underfunded, and the PBGC's future exposure to losses from financially troubled sponsors remains high. See PBGC Report 3-5, 15-16. The single-employer insurance program has an $18.1 billion deficit, and the PBGC estimates a reasonably possible exposure to $73 billion in underfunding. *Id.* at 4-5, 14-15. The total underfunding in all single-employer plans is estimated at $350 billion. *Id.* at 15. The PBGC's separate multiemployer plan insurance program has a deficit of $739 million, and $83 million in reasonably possible liability. *Id.* at 5, 14, 16. The total underfunding in multiemployer plans is estimated at more than $150 billion. *Id.* at 15. Although the Pension Protection Act of 2006, Pub. L. No. 109-280, Titles I, II, 120 Stat. 784, 858, attempts to address underfunding problems with new funding rules, PBGC Report 8, the PBGC is not in a position unnecessarily to assume responsibility for more underfunded plans.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 05-1448

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In The

Supreme Court of the United States

JEFFREY H. BECK, Liquidating Trustee of the Estates of Crown Vantage, Inc. and Crown Paper Company,

Petitioner,

v.

PACE INTERNATIONAL UNION, EDWARD J. MILLER, and JEFFREY D. MACEK,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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		AND LIMITED TO 5 PAGES, TO BE SUBMITTED WITHIN ONE WEEK. 4) ORAL RULING WILL BE MADE VIA TELEPHONE ON DECEMBER 11, 2001 @ 3:00 P.M. MARY WARREN TO SET UP TELEPHONE CONFERENCE WITH ALL PARTIES. 5) TRO TO STAY IN EFFECT UNTIL DECEMBER 11, 2001. (plt) (Entered: 12/04/2001)
12/20/2001	18	Motion by Plaintiff PACE International Union For Clarification of Preliminary Injunction (plt) (Entered: 01/04/2002)
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Relevant Docket Entries in the United States District Court for the Northern District of California, Case No. 02-01407

Date	Dkt. No.	Entry
03/22/2002	1	Notice of APPEAL FROM BANKRUPTCY COURT. Bankruptcy Court case number 01-4375. File received. Filed by Crown Vantage, Inc.. (be,) (Entered: 03/29/2002)
12/09/2002	19	Minute Entry: Bankruptcy Appeal hearing held on 12/9/2002 before Chief Judge Marilyn H. Patel. Counsel submit after further discussion; Matter deemed submitted; Court to issue order; (Court Reporter Debra Pas.) (gba) (Entered: 12/16/2002)
01/10/2003	20	MEMORANDUM AND ORDER by Chief Judge Marilyn H. Patel that the court hereby AFFIRMS the preliminary injunction as issued by the bankruptcy court. The court further ORDERS that Pace International Union is DISMISSED from the present action. DISMISSING CASE. (gba) (Entered: 01/14/2003)
02/06/2003	21	NOTICE OF APPEAL re [20] by Crown Vantage, Inc.. (Filing fee $105.00 receipt number 3343954) (gba,) (Entered: 02/07/2003)

02/18/2003	23	NOTICE OF CROSS APPEAL re [20] by Pace International Union. (Filing fee $105.00 receipt number 3344420) (gba,) (Entered: 02/20/2003)

APPENDIX 3
Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit, Case Nos. 03-15303, 03-15331

Date	Entry
02/20/2003	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): no. setting schedule as follows: appellant's designation of RT is due 2/18/03; appellee's designation of RT is due 2/26/03; appellant shall order transcript by 3/10/03; court reporter shall file transcript in DC by 4/8/03; certificate of record shall be filed by 4/15/03; appellant's opening brief is due 5/27/03; appellees' brief is due 6/24/03; appellants' reply brief is due 7/8/03; 03-15303! (dg) [03-15303]
02/27/2003	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT: no. The x-appeal brfing schedule is as follows: designation dsgn of RT is due 2/28/03 for Pace International in 03-15331; designation of RT is due 3/10/03 for Beck in 03-15331; Pace shall order transcript by 3/20/03 in 03-15331; court reporter shall file in DC by 4/21/03 for Katherine Pope Wyatt in 03-15331; certificate of record shall be filed by 4/28/03 in 03-15331; 1st x-appeal brf is due 5/27/03 for Beck; 2nd x-appeal brf is due 7/7/03 for Pace International; 3rd x-appeal brf is due 8/6/03 Beck; optional x-appeal rpy brf is due 8/20/03

	for Pace International. [03-15331, 03-15303] (jr) [03-15303 03-15331]
11/4/2004	ARGUED AND SUBMITTED TO Stephen R. REINHARDT, Richard A. PAEZ, Marsha S. BERZON [03-15303] (wp) [03-15303]
10/24/2005	FILED MEMORANDUM DISPOSITION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Unsigned, Unpublished. Stephen R. REINHARDT, Richard A. PAEZ, Marsha S. BERZON) FILED AND ENTERED JUDGMENT. [03-15303, 03-15331] (mhf) [03-15303 03-15331]
10/24/2005	FILED OPINION: AFFIRMED in part; VACATED in part and REMANDED. The mtns to take judicial notice on filed on 3/16/04 and 6/7/04 are DENIED. (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Stephen R. REINHARDT; Richard A. PAEZ, author; Marsha S. BERZON.) FILED AND ENTERED JUDGMENT. (mhf) [03-15303 03-15331]
1/10/2006	Filed order (Stephen R. REINHARDT, Richard A. PAEZ, Marsha S. BERZON): . . . the petition for rehearing and the petition for rehearing en banc is denied. [5621646-1] [03-15303, 03-15331] (gva) [03-15303 03-15331]

5/15/2006	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 05-1448 filed on 5/10/06. (PANEL) [03-15303, 03-15331] (gva) [03-15303 03-15331]

APPENDIX 4
Motion by PACE International Union for Temporary Restraining Order (Adv. No. 01-4375AN, Bankr. N.D. Cal., filed Nov. 15, 2001)

CHRISTIAN L. RAISNER, Bar No. 133839
JOHN PLOTZ Bar No. 67155
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180 Grand Avenue, Suite 1400
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Attorneys for Creditors
PACE International Union, AFL-CIO,
On behalf of Represented Employees and Participants,
Including Creditors Edward J. Miller and
Jeffrey D. Macek and others similarly situated

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re	) Jointly Administered
CROWN VANTAGE, INC.,	) No. 00-41584N
Debtors,	) Chapter 11
Employer I.D. No. 54-1752384	) Adversary No. 01 4375 AN
PACE INTERNATIONAL UNION, on behalf of members and former member participants in pension plans sponsored by the Debtors; Edward J. Miller, Jeffrey D.	) **EMERGENCY MOTION UNDER BANKRUPTCY RULE 7065 FOR A TEMPORARY ORDER RESPECTING HOURLY PENSION PLANS**

Macek on behalf of themselves and others similarly situated, Plaintiffs, vs. CROWN VANTAGE INC.; CROWN PAPER COMPANY; TRUSTEES OF CROWN VANTAGE PENSION PLANS NOS. 1-1, 4, 7, 10, 11, Adams, Peninsular, Milford, Port Huton, Richmond Frozen Plan No. 4, Frozen Peninsular, Frozen Plan No. 1-1, Frozen Adams, Frozen, Milford, Frozen Port Huron an Frozen Richmond, GEORGE B. JAMES, JAMES S. WATKINSON, E. LEE SHOWALTER, ROBERT A. OLAH, DONNA WEAVER and WILLIAM WALSH, as Directors of Crown Vantage, Inc. and of Crown Paper Co.; and EVAN DAVIS, as an officer of the Debtors and a fiduciary to the Debtors' pension plans covering hourly employees, Defendants.	Hearing Date: To be set by the Court pursuant to Bankruptcy Local Rules 9006-1 and 9014-1. (Filed Nov. 13, 2001)*

* [Editor's Note: The bankruptcy court docket and the text of this motion both indicate that it was in fact filed on Nov. 15, 2001. However, the record copy of the motion bears a filestamp dated Nov. 13, 2001.]

To Debtors and all other parties entitled to notice, and to the Department of Labor and the Pension Benefit Guaranty Corporation:

Please take notice that on ___ at ___, in the United States Bankruptcy Court for the Northern District of California, Oakland Division, located at 1301 Clay Street in Oakland, Plaintiffs and Creditors will, and hereby do, move for an Order on the terms stated in the Proposed Order filed herewith.

This motion is based on all the files in the bankruptcy proceeding, including but not limited to the OBJECTIONS TO CONFIRMATION OF DEBTORS' JOINT LIQUIDATING PLAN OF REORGANIZATION, and papers in support thereof, filed by the Plaintiffs and Creditors on November 13, 2001. This motion is further based on the *Declaration of Christian L. Raisner*, filed herewith.

Immediate relief is appropriate under Bankruptcy Rule 7065 because Plaintiffs are suffering and will suffer immediate and irreparable injury. This injury includes, but is not limited to the fact that Defendants have wrongfully transferred more than $84 million in pension assets to Hartford Life Insurance Company, where all interest and dividends are accruing to Hartford, rather than to the pension plans.

Plaintiffs and Creditors are likely to prevail in the adversary proceeding.

I certify that I have complied with Federal Rule of Civil Procedure 65(b) by sending a facsimile transmission of the adversary Complaint and this motion on the attorneys for Debtors and on the Pension Benefit Guaranty Corporation.

Dated: November 15, 2001

Respectfully submitted,

VAN BOURG, WEINBERG,
ROGER & ROSENFELD
A Professional Corporation

By: /s/ Christian L. Raisner
CHRISTIAN L. RAISNER
Attorney for Creditor
PACE International Union

[Proof Of Service Omitted In Printing]

APPENDIX 5
First Amended Complaint for Declaratory and Injunctive Relief and Money Relief for Breach of Fiduciary Duties Respecting Pension Plans and for Appointment of Independent Fiduciary (Adv. No. 01-4375AN, Bankr. N.D. Cal., filed Nov. 19, 2001)

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PACE International Union, AFL-CIO,
On behalf of Represented Employees and Participants,
Including Creditors Edward J. Miller and
Jeffrey D. Macek and others similarly situated

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re	)	Jointly Administered
CROWN VANTAGE, INC.,	)	No. 00-41584-N
Debtors,	)	Chapter 11
Employer I.D. No. 54-1752384	)	Adversary No._01 4375 AN

PACE INTERNATIONAL UNION, on behalf of members and former member participants in pension plans sponsored by the Debtors, Edward J. Miller, Jeffrey D. Macek on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

CROWN VANTAGE INC.; CROWN PAPER COMPANY; TRUSTEES OF CROWN VANTAGE PENSION PLANS NOS. 1-1, 4, 7, 10, 11, Adams, Peninsular, Milford, Port Huron, Richmond Frozen Plan No. 4, Frozen Peninsular, Frozen Plan No. 1-1, Frozen Adams, Frozen, Milford, Frozen Port Huron and Frozen Richmond; GEORGE B. JAMES, JAMES S. WATKINSON, E. LEE SHOWALTER, ROBERT A. OLAH, DONNA WEAVER and WILLIAM WALSH, as Directors of Crown Vantage, Inc. and of Crown Paper Co.; and EVAN C. DAVIS, as an officer of the Debtors and a fiduciary to the Debtors' pension plans covering hourly employees,

Defendants.

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND MONEY RELIEF FOR BREACH OF FIDUCIARY DUTIES RESPECTING PENSION PLANS AND FOR APPOINTMENT OF INDEPENDENT FIDUCIARY

(Filed Nov. 19, 2001)

This Complaint is brought on behalf of participants and beneficiaries of the pension plans covering hourly employees of the Debtors, to remedy breaches of fiduciary duty, for preliminary and permanent injunctive relief to restore the status quo before October 9, 2001, declaring void and rescinding the transfer of more than $84 million in pension assets to Hartford Life Insurance Company, and appointing an Independent Fiduciary instead of Defendants, to evaluate the disposition of pension plans covering hourly employees, based on all information available and applying ERISA fiduciary standards.

I. JURISDICTION, PARTIES AND VENUE

1. Plaintiff Paper, Allied-Industrial, Chemical & Energy Workers International Union, AFL-CIO ("PACE"), and its local unions represent more than a thousand workers formerly employed by Crown Vantage, Inc., and Crown Paper Co. PACE is a creditor and party in interest in jointly administered Case No 00-41584N. PACE had collective bargaining agreements at six of the Debtors' seven mills, all of which set pension levels.

2. Plaintiff Edward J. Miller is a retired employee of Creditors and is a participant in two of its pensions plans, Nos. 1-1 and Frozen 1-1. Jeffrey D. Macek is a former employee of Creditors, not yet retired, and is a participant in two other of its pension plans, Adams and Frozen Adams, which were merged into Plan No 7. Miller and Macek are creditors and parties in interest and in this Complaint are referred to as "Participants." Participants of other pension plans intend to join this Complaint as Plaintiffs. Participants bring this action on behalf of themselves and others similarly situated.

3. Defendants Crown Vantage, Inc. and Crown Paper Co. (collectively "Crown" herein) are the Debtors and Debtors-in-Possession in the jointly administered bankruptcy case No. 00-41584N. Defendants GEORGE B. JAMES, JAMES S. WATKINSON, E. LEE SHOWALTER, ROBERT A. OLAH, DONNA WEAVER and WILLIAM WALSH are Directors of Crown Vantage, Inc., and Crown Paper Co., and as such have authority to determine the actions of Crown Vantage, Inc. and Crown Paper Co., in respect of the pension plans. Defendant EVAN C. DAVIS is Senior Vice President, General Counsel and Secretary of Crown Vantage, Inc., and Crown Paper Co., and as such exercises effective control of the pension plans. These individuals sued in their capacities as fiduciaries. Each of the Defendants was, and is, at times material to this Complaint, fiduciaries of the Debtors' pension plans covering its hourly employees ("Pension Plans"), pursuant to Section 3(21)(A) of ERISA, 29 U.S.C. §1002(21)(A). The Defendants, and each of them, exercised contractual, functional and/or *de facto* discretionary authority or discretionary control over the management of the Pension Plans; exercised authority or control respecting management or disposition of the Pension Plans' assets; and had discretionary authority or discretionary responsibility in the administration of the Pension Plans.

4. This is a core proceeding over which this court has jurisdiction pursuant to 28 U.S.C. §157(b)(2) and 11 U.S.C. §105. This matter relates to the case of Crown Vantage, Inc, Jointly Administered No 00-41584-N-11, currently pending in the Northern District of California in the Oakland Division, where venue is proper. All of the Defendants are Debtors or acted as agents of the Debtors in this

Chapter 11 case. All of the Plaintiffs are creditors of the Debtors.

5. This action seeks declaratory and injunctive relief for, *inter alia*, breach of fiduciary duties under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §1001, *et seq*. Jurisdiction of this Court arises under and pursuant to Sections 502(a)(2) and (e)(1) of ERISA, 29 U S.C. §§1132(a)(2) and (e)(1), and 28 U S.C. §1331. A copy of this Complaint is being served on the Secretary of Labor and the Secretary of the Treasury pursuant to Section 502(h) of ERISA, 29 U.S.C. §1132(h).

6. This matter is properly brought as an adversary proceeding pursuant to Rule 7001, F.R. Bankr. P.

II. FACTUAL ALLEGATIONS

7. Crown is the sponsor and plan administrator of at least 16 pension plans that covered hourly employees. Several thousand workers are covered. These are single-employer, defined benefit plans, with the level of benefit being defined in collective bargaining agreements. Appendix A to this brief lists all pension plans for hourly employees for which Crown Paper Co. is currently the sponsor and plan administrator. Some of the Pension Plans, known as "frozen plans," were established by predecessors of Crown, primarily James River. On August 22, 1995, Crown assumed responsibility for these James River plans, which became "frozen" in the sense that the participants would not accrue further benefits. On the same date, Crown created a series of new "on-going plans" for its current employees. Benefits under the on-going plans accrued only after August 22, 1995. Since then, several of the on-going

or frozen plans have merged or been taken over by other entities, such as Tembec, which took over the St. Francisville pension plans.

8. Crown filed its Chapter 11 petition on March 15, 2000. Except as to the St. Francisville plant, whose pension plan is no longer Crown's responsibility, Crown did not seek to have its collective bargaining agreements abrogated or modified under Section 1113. According to the information provided to PACE by the Debtors, 13 of the Pension Plans are now underfunded. With a single minor exception, Crown made no contributions to the frozen plans, since the filing of the Chapter 11 petitions.

9. From March 15, 2000, to the present, Crown has not made contributions to the plan sufficient to keep them adequately funded.

10. From March 15, 2000, to the present, Crown has not kept participants informed of the plans' underfunding.

11. Crown did not file any claims in the bankruptcy proceedings for moneys due to the plans.

12. By July 2001, Crown had disposed of, or closed, all of its paper mills. In July and early August, Crown was considering termination of the pension plans under 29 U.S.C. § 4041, which permits termination of a pension plan where annuities can be purchased for all participants providing the full amount of benefits available as a pension. Some of the plans were overfunded and some underfunded, and Crown decided to merge eleven plans into one of the plans.

13. This, Crown speculated, might provide enough money to purchase a single-premium annuity policy. Acting on the unfounded notion that PBGC would not

permit an underfunded frozen plan to join the merger, Crown left five frozen plans out of the merger and effectively abandoned them to PBGC.

14. On July 20, Crown hired Dietrich & Associates, Inc., to help in the purchase of annuities. Dietrich's commission for this work is .2% of the premium – more than $168,000. Dietrich was to assemble the facts and figures concerning pension assets and benefits, solicit bids from various insurance companies, evaluate the bids, and submit a proposal to Crown. Among Dietrich's duties was to "explore and present alternative contractual arrangements that may warrant consideration . . . "

15. In the middle of August, Crown's chief officer Evan Davis met with PACE Vice-President Bob Smith. Smith suggested that having PIUMPF take over all the remaining hourly pension plans would be a good solution. PIUMPF stands for PACE Industry Union-Management Pension Fund. PIUMPF is a multi-employer Taft-Hartley trust with equal numbers of employer and union trustees. It has assets exceeding $1.3 billion dollars, includes 280 paper industry employers, and covers approximately more than 16 retirees. Davis agreed that it should be looked into. The August 28 minutes of Crown's Board of Directors state:

> The Union has offered to consider taking on all the hourly pension plans into PIUMPF, the union multi-employer plan. They are reviewing the data and will be notifying us if this is acceptable. Since this would be *a favorable alternative* we are delaying the quotes on annuities that are presently being developed until this is resolved.

16. PIUMPF commissioned The Segal Company to analyze the data made available by Crown. Based on that analysis, PIUMPF was willing to merge *all* hourly pension plans, thereby paying 100 cents to the dollar to *every* Crown retiree and employee. At some later point Crown informed PACE that it should exclude Frozen Plan No. 1-1, Frozen Adams, Frozen Milford, Frozen Port Huron and Frozen Richmond from the merger, leaving only 11 plans for merger. On October 8, 2001, PIUMPF offered to merge these 11 plans.

17. The merger of plans into PIUMPF was in fact a favorable alternative that would fully protect the benefits of all Pension Plan participants. The PIUMPF alternative would also provide certain additional benefits and advantages to the participants:

a. If all plans are merged into PIUMPF, retirees would receive a single pension check from PIUMPF. If an annuity is purchased instead, the retirees will receive separate checks – one from PBGC or Georgia-Pacific to cover the frozen plan and another from Hartford Insurance to cover the Crown on-going plans. In principle these smaller checks will total to the same amount as a single PIUMPF check; but they will also cause trouble, expense and confusion to their elderly recipients.

b. PIUMPF has a history of increasing retiree benefits when its assets accumulate but annuities purchased from an insurance company would deny the retirees any opportunity to obtain an increased benefit. An annuity would pay retirees only a fixed amount, with any increase in assets going to the profit-making insurance company.

c. PIUMPF has well-defined dispute resolution procedures. Disputes between employers and the union

about the meaning of the plan are handled by the American Arbitration Association. Disputes by claimants about eligibility or amount are handled quickly and fairly: Denial of a claim must be supported by evidence. If the claimant is dissatisfied, there is direct appeal to the PIUMPF board of trustees, composed of equal numbers of industry and union representatives.

d. When merged into PIUMPF the pension assets continue to be held by ERISA fiduciaries and are safe from the retiree's creditors.

e. If PIUMPF should fail, the PBGC stands as guarantor. If an insurance company should fail (as, for example, Executive Life Insurance Co. did), the retiree is out of luck, except for suits against the ERISA fiduciaries. See, e.g, *Bussian v. RJR Nabisco, Inc.* (5 Cir. 2000) 223 F.3d 286.

18. The September 26 minutes of the Crown Board of Directors state:

> The Union has offered to take all of the hourly pension plans into PIUMPF, the union multi-employer plan This offer will be evaluated in comparison to the annuitization of plans when we receive final bids from the annuity providers . . .

The Crown Board of Directors met on October 9, 2001. Until late in the afternoon of October 9, Crown had not received the annuity provider bids. When the Board met at 4:30 p.m., its attorney informed it that a decision had to be made *that very day* – and a decision was made. The minutes state:

> The offer of Pace International Union to merge the hourly plans into PIUMPF, their multi-employer plan was discussed. While it is anticipated that

> the Union will be disappointed with the decision to annuitize the plans rather than effect a merger, the PBGC has expressed reservations about this course of action. While the PBGC agreed to release the two plans under the James River Agreement and any other claims against the estate under the annuitization scenario, there was no such agreement if we insisted on the merger [with PIUMPF].

In fact, PBGC had not evaluated the PIUMPF merger alternative and had no reservations about it.

19. Debtors had interests in conflict with those of the pension plan participants in that Debtors believed that they were entitled to a reversion of the pension plan assets. Evan C. Davis and four of six Directors had interests in conflict with those of the pension plan participants in that they had filed claims in the bankruptcy proceedings.

20. On October 11, 2001 without the knowledge of PIUMPF, PACE, or the Bankruptcy Court, Crown transferred $84,145,794 to Hartford Life Insurance Company. No one at Crown – neither the Board of Directors nor Shearman & Sterling nor Dietrich – ever saw the Group Annuity Contract before transferring as a deposit the sum exceeding $84 million. The exact terms of the policy were unknown to Crown when it made the transfer and when it made the decision to purchase annuities.

21. Crown failed to evaluate the PACE offer "in comparison to the annuitization of plans when we receive final bids from the annuity providers," between September 26 and October 9, or at any time. The Crown Board of Directors failed to examine the information it had requested and received from PIUMPF. No part of the

PIUMPF offer sent to Dietrich, which was being paid more than $168,000 to advise on the future of the pension plans. The only entity to look at the PIUMPF material was the law firm of Shearman & Sterling, which made no written comparison. The Crown Board did not know that PIUMPF had a history of increasing pension benefits. The Crown Board took no account of the other points of comparison, such as the PIUMPF dispute resolution procedures or the importance of retiree's receiving a single pension check from a single source.

22. On October 25, without the knowledge of PACE or this Court, Crown amended the plan documents to cause eleven plans to merge.

23. On October 31, again without prior notice to PACE, other parties in interest or the Court, Crown wrote to its former employees informing them that their pension plans had been terminated. A copy of the letter was not forwarded to PACE or its counsel. The letter told each employee to expect receiving checks in a particular dollar amount from Hartford Life Insurance Company for that portion of his or her pension covered by the Crown on-going plans. Employees were not informed that for most of the frozen plans they might expect a check – in an uncertain amount – from PBGC, or perhaps from Georgia-Pacific.

24. Also on October 31, Crown sent a Notice of Termination of the pension plans to PBGC – claiming a reversion of somewhere between $3.2 and $4 million. Yet on October 4, 2001 Crown's attorney ~~stated~~ in open court that disposition of the pension plans "doesn't affect the distribution one bit under the [Reorganization] Plan. The fact is they're not Crown assets; they're not Crown Paper's

assets, Crown Paper is acting as a fiduciary because they're Plan sponsor." The termination provisions of the merged pension plan do not allow Crown to take any reversion.

25. While the $84 million remains with Hartford, interest and dividends on that amount to accrue to Hartford, not to the Crown pension plans. The plans are suffering a loss of interest exceeding $10,000 per day.

FIRST CAUSE OF ACTION

(Breach of Fiduciary Duty)

26. The preceding paragraphs numbered 1-25 are incorporated by this reference into this Cause of Action.

27. The Defendants, and each of them, exercised actual, contractual, functional and/or de facto discretionary authority or discretionary control over the management of the Pension Plans, exercised authority or control respecting management or disposition of Pension Plan assets, and had discretionary authority or discretionary responsibility in the administration of the Pension Plans.

28. As fiduciaries of the Pension Plans, the Defendants, and each of them, in the conduct alleged above in this Complaint, failed to comply with ERISA Section 404(a), 29 U.S.C. §1104(a), and failed to exercise the care, skill, prudence and diligence required of a fiduciary under ERISA Sections 3(21)(A) and 405(c)(1)(B), 29 U.S.C. §§1002(21)(A) and §1105(c)(1)(B), in that Defendants did not discharge their duties to the Pension Plans and the participants and beneficiaries with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and

familiar with such matters would use in the conduct of an enterprise of a like character and like aims. These duties included, but were not limited to, the duty to perform a diligent investigation into the PIUMPF proposal and to make a detailed comparison between the PIUMPF proposal and the Hartford proposal.

29. In the conduct alleged above in this Complaint, the Defendants, and each of them, failed to discharge their duties solely in the interest of the participants and beneficiaries and for exclusive providing benefits to participants and their beneficiaries and defraying reasonable administrative expenses as they were required to do by ERISA Section 404(a)(1)(a), 29 U.S.C. §1104(a)(1)(a). Defendants also failed to adhere to the lawful provisions of plan documents as they were required to do by ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). These failures include, but are not limited to, failure to accept the PIUMPF plan, which was more in the interest of the participants than the Hartford plan. The failures also include, but are not limited to, placing $84,000,000 into an account where it earned no interest or dividends and could not grow.

30. In the conduct alleged above in this Complaint, the Defendants, and each of them, were in an actual conflict of interest. They did not take adequate steps to assure that any decision they made in respect of the pension plans was unbiased.

31. The failure of the Defendants to carry out their fiduciary duties in accordance with ERISA standards continues to this date, at great risk of expense to the Pension Plans. The harm caused to all participants and beneficiaries will be permanent and to many, if not all of

them the harm will extremely severe. If relief is not granted, many of the participants and their beneficiaries will suffer permanent loss of the opportunity to obtain a full or increased benefit. If relief is not granted, participants and their beneficiaries will be denied forever the services of prudent and faithful fiduciaries and will be deprived of the possibility of enhanced benefits. If relief is not granted there will never be a fair consideration of the benefits of merger of the Pension Plans into PIUMPF. If relief is not granted, a reversion will pass through the bankruptcy estate for the benefit of various of the Defendants themselves who have claims against the estate. If relief is not granted, the Debtors' direct breach of the instructions of the Bankruptcy court, and the promise to follow them, will be rewarded rather than be condemned and halted as required by the interests of justice and respect for the judicial process.

32. Plaintiffs are entitled to a declaration that Defendants have breached their ERISA fiduciary duties of care and loyalty toward the Participants and their beneficiaries by engaging in the conduct alleged in this Complaint.

33. ERISA provides remedies for the fiduciary breaches alleged herein, including, in addition to the declaratory relief, an injunction and any other appropriate equitable relief to redress violations of ERISA and the terms of the Pension Plan. In this situation, where Defendants have acted with conflicting interests and disregarding their fiduciary duties, the following relief is available and is required:

a. An order of the Bankruptcy Court directing the Defendants to rescind any action made since October 9 respecting the Pension Plans and to restore fully the status quo ante; and

b. Appointment of an Independent Fiduciary is needed, to replace all of the Defendants with respect to any control or authority over Pension Plan assets. The Independent fiduciary perform all fiduciary duties required by ERISA and should evaluate all options available in the interests of participants and beneficiaries, subject to review by the Court, including merger of plans into PIUMPF.

34. Plaintiffs are entitled to an award of their reasonable attorneys fees and the costs of this action.

SECOND CAUSE OF ACTION

(Breach of Fiduciary Duty as to Underfunding)

35. Crown violated its fiduciary duties to participants by failing, from March 15, 2000, to the present day, to make contributions to the plans to keep them adequately funded.

36. Crown violated its fiduciary duties to participants by failing, from March 15, 2000, to the present day, to give adequate notice to participants and their representatives of the plans' underfunding.

37. Crown violated its fiduciary duties to participants by failing, from March 15, 2000, to the present day, to file claims in the bankruptcy proceedings on behalf of the plans.

PRAYER FOR RELIEF

Plaintiffs in this Complaint respectfully request that the following relief be granted in their favor and against all of the Defendants:

A. A declaration that the Defendants have breached their duties of care and loyalty to the participants and beneficiaries by failing to evaluate the options of merger of plans into PIUMPF, in transferring funds tc Hartford Life Insurance Company, and in deciding to terminate plans and purchase annuities while stating that no decision had been made, in sending notices regarding plan termination to participants and to PBGC, and by failing to abide by the court's directive to include in the plan of reorganization the right to receive notice and a hearing before any action would be taken respecting Pension Plans.

B. An order enjoining all Defendants from proceeding in any manner regarding the Pension Plans for hourly employees, except to preserve the status quo as it existed before October 9, 2001, and declaring void and rescinding any and all acts effecting transfer of Pension Plan assets to Hartford Insurance Company.

C. An order appointing an Independent Fiduciary to act as the fiduciary to all of the Pension Plans in place of all of the Defendants, to evaluate the constitution of the Pension Plans and to consider all options available in the interests of the Participants and their beneficiaries, and, subject to review by the Court, to take appropriate action consistent with ERISA fiduciary duties.

D. An order requiring Defendants, and each of them, to pay into the pension plans an amount sufficient to fund them adequately – an amount to be proved at trial.

E. An order requiring Defendants, and each of them, to pay Plaintiffs reasonable attorneys fees and costs.

F. Such other and/or further relief as may seem appropriate to the Court.

Dated: November 19, 2001

VAN BOURG, WEINBERG,
ROGER & ROSENFELD
A Professional Corporation
By: /s/ Christian L. Raisner
CHRISTIAN L. RAISNER
Attorneys for Plaintiffs

APPENDIX 6

***Excerpts from* Transcript of Proceedings: Nov. 29, 2001, Hearing re: TRO, Preliminary Injunction (Adv. No. 01-4375AN, Bankr. N.D. Cal.)**

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re	) Case No. 00-41584 N
CROWN VANTAGE, INC.,	) Case No. 00-41583 N) Jointly Administered
Debtor.	) Chapter 11
PACE INTERNATIONAL UNION,	) Adversary Proceeding) No. 01-4375 AN
Plaintiffs,	) Oakland, California
vs.	) Thursday, November 29, 2001) 9:30 a.m. Calendar
CROWN VANTAGE, CROWN PAPER COMPANY, ET AL.,	) TRO, PRELIMINARY INJUNCTION
Defendants.	)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RANDALL J. NEWSOME,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

For the Plaintiffs: JOHN PLOTZ
CHRISTIAN L. RAISNER
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For the Defendants:	MARY K. WARREN JUDITH GERMANO SHEARMAN & STERLING 599 Lexington Avenue New York, NY 10022-6069 (212) 848-4000 (212) 848-7179 (fax)
[2] Court Recorder:	Todd Leyba U.S. Bankruptcy Court 1300 Clay Street, Suite 300 Oakland, CA 94612 (510) 879-3570
Transcription Service:	Kathy Rehling 209 Bay Circle Coppell, TX 75019 (972) 304-1998 (972) 304-2298 (fax)

* * *

[3] THE COURT: All right. Rather than taking up opening statements at this point, I think I actually have a pretty fair idea as to what the issues are. We have someone on – a witness on the telephone. I would propose that we go forward with that testimony, and then come back and resume from there. Is that satisfactory?

MR. PLOTZ: Yes, Your Honor.

MS. WARREN: That's fine.

THE COURT: Okay. Then what arrangements have been made to swear in the witness that's on the phone?

MR. PLOTZ: Your Honor, we have arranged to have a notary court reporter present in Mr. DeFranco's office –

THE COURT: All right.

[4] MR. PLOTZ: – of his swearing-in from Washington, D.C. I assume that that person is there.

THE COURT: Is there a notary or court reporter present with Mr. DeFranco?

MR. DE FRANCO: There is.

THE COURT: And – all right, then. Why not have the notary or court reporter swear in the witness on the record at this point?

MR. DE FRANCO: Would you like to hear her do that?

THE COURT: Yes, I would.

MR. DE FRANCO: Just a moment, Your Honor.

NOTARY PUBLIC: Good morning, Your Honor.

THE COURT: Good morning.

NOTARY PUBLIC: This is Lisa Dimonte. I'm the notary public from Washington, D.C.

THE COURT: Thank you.

NOTARY PUBLIC: You're welcome.

THE COURT: Would you like to swear in Mr. DeFranco, please?

NOTARY PUBLIC: Yes, sir.

THE COURT: All right.

JOSEPH DE FRANCO, PLAINTIFFS' WITNESS, SWORN

THE COURT: All right. Thank you very much, Mr. DeFranco. Would you like to state your name for the record, please?

[5] THE WITNESS: Joseph DeFranco, D-E-F-R-A-N-C-O.

THE COURT: All right. Mr. Plotz, you may resume.

DIRECT EXAMINATION

BY MR. PLOTZ:

Q Mr. DeFranco, what is your position?

A I'm an attorney with the Office of General Counsel of the Pension Benefit Guaranty Corporation.

Q In that capacity, did you provide legal counsel to PBG staff and do lawyer's work relating to the present bankruptcy case, Crown Vantage, Inc.?

A Yes, I did.

Q Okay. Was it your understanding that in the summer of 2001, PACE International made a proposal to the attorneys for Crown Vantage to effectively have Crown merge certain of Crown's defined benefit pension plans into a single defined benefit plan, and then to have that resulting plan merge into a multi-employer plan maintained by PACE?

A Yes. Crown attorneys so advised me.

Q Did you ever state to a Crown attorney, or to anyone at Crown, that the agency had a reservation about the proposal?

A I did not.

Q Did you ever state that the agency had a concern about the proposal?

A I did not.

Q To your knowledge, has any person at PBGC expressed an [6] opinion to Crown, favorable or unfavorable, on the PACE proposal?

A Not to my knowledge.

Q I don't know, sir: do you have in front of you the correspondence between you and Mr. Cicero?

A That was attached to your motion?

Q Actually, I don't recall if it was or not.

A Well, there's some correspondence that was attached as Exhibit A to one of the documents.

Q Well, let me just ask you briefly.

A I have some of the correspondence.

MS. WARREN: Excuse me, counsel.

MR. PLOTZ: Okay.

THE WITNESS: Go ahead.

MS. WARREN: I don't have that in front of me.

THE WITNESS: Okay.

MS. WARREN: This was attached to your motion, Mr. Plotz?

MR. PLOTZ: I actually don't remember. I don't recall what Mr. DeFranco –

THE COURT: What are you – what is it that you're referring to exactly?

MR. PLOTZ: Okay.

THE COURT: Not just "correspondence."

MR. PLOTZ: Okay.

[7] BY MR. PLOTZ:

Q Is Exhibit 16 of our –

THE COURT: What is the – Mr. Plotz?

MR. PLOTZ: Yes?

THE COURT: What is the letter that you're referring to?

MR. PLOTZ: It is –

THE COURT: What is the date of the letter? Who is it from, and who is it to?

MR. PLOTZ: It is a July 27th, 2001 letter from Robert Cicero to Michael Vito (phonetic).

THE COURT: Do you have that document, Mr. DeFranco?

THE WITNESS: I'm looking for it –

THE COURT: All right.

THE WITNESS: – to see if I do or I don't.

(Pause.)

THE WITNESS: July 27, Mr. Cicero to Mr. Vito. I do.

THE COURT: All right.

MR. PLOTZ: Okay.

BY MR. PLOTZ:

Q Did you receive that letter?

A Yes, I was copied on it.

Q Thank you. Referring to a letter dated October 11th, 2001, –

THE COURT: Do you have exhibit numbers for any of [8] these?

MR. PLOTZ: I do. Exhibit 36.

THE COURT: Was that the Cicero letter?

MR. PLOTZ: This is a letter from –

THE COURT: I'm talking about the – Mr. Plotz, I'm talking about the first letter.

MR. PLOTZ: Yes.

THE COURT: I need to look at these as we go along.

MR. PLOTZ: I'm sorry. Yes, it was –

THE COURT: What's the exhibit number of the first letter?

MR. PLOTZ: The exhibit number of the first letter is Exhibit 16.

THE COURT: Thank you.

MR. PLOTZ: It is a letter from Mr. Cicero to Mr. Vito –

THE COURT: All right.

MR. PLOTZ: – at PBGC.

BY MR. PLOTZ:

Q Referring to Exhibit 36, which is a letter from Mr. DeFranco to Mr. Cicero dated October 11th, do you have that in front of you, sir?

A I have that letter.

Q Did you send that letter?

A Yes, I did.

[9] Q Thank you.

MR. PLOTZ: That's all the questions I have.

THE COURT: All right. Thank you. Ms. Warren?

CROSS-EXAMINATION

BY MS. WARREN:

Q Mr. DeFranco, my name is Mary Warren. I'm with Shearman & Sterling, representing the defendants. Good morning.

A Good morning.

Q During the summer and fall of this year, about how often did you speak to someone from Shearman & Sterling about Crown's disposition of its pension plans?

A A number of times.

Q Would you say fairly frequently?

A No, because I don't know what that means, but a number of times.

Q A few times a month?

A It could have been.

Q Who was your primary contact at Shearman & Sterling?

A Mr. Cicero.

Q And during the summer and fall of this year, did you ever tell Mr. Cicero, in words or substance, that the PBGC thought a standard termination of Crown's pension plans was a bad idea?

A Say that again.

Q Did you ever tell Mr. Cicero, in words or substance, that the PBGC thought a standard termination of Crown's pension plans [10] was a bad idea?

A I did not.

Q Did you ever tell Mr. Cicero, in words or substance, that the PBGC wanted Crown to stop the standard termination process?

A No.

Q Did you ever tell Mr. Cicero, in words or substance, that the PBGC thought it would be harmful for pension plan participants if Crown effectuated a standard termination of its plans?

A No.

Q During your conversations with Mr. Cicero about a possible PIUMPF merger, did you make any promises about whether PBGC would release the frozen plans in that context, if that's what Crown decided to do?

A I'm sorry. I didn't understand the first part of your question.

Q Sure. Let me –

A Can you repeat it?

Q Sure. During your conver . . .

A What was the word you used?

THE COURT: Let her repeat the question, Mr. DeFranco.

THE WITNESS: Okay.

BY MS. WARREN:

Q During your conversations with Mr. Cicero about a possible PIUMPF merger, –

A What's a PIUMPF? I'm sorry.

[11] Q Okay. It's the PACE Industry –

A Oh, okay.

Q – Union Management Pension –

A Okay. That's the word I didn't understand.

Q Okay. Sorry about that.

A Okay.

Q So I'll be using the term PIUMPF to refer to that plan.

A Okay. That's fine now. Right.

Q All right. So during your conversations with Mr. Cicero about a possible PIUMPF merger for the Crown plans, –

A Okay.

Q – did you make any promises about whether PBGC would release the frozen plans in that context?

A No.

Q Is it fair to say that you reserved PBGC's right to decide what to do with the frozen plans if Crown chose the PIUMPF merger?

A I'm not sure that issue came up.

Q Okay.

A Can you repeat the question?

Q Well, is it fair to say that you reserved PBGC's right to decide what, if anything, to do with the frozen plans if Crown ended up choosing the PIUMPF merger instead of a standard termination?

A Well, I think the answer to that has to be yes.

[12] Q Thank you. That's all I have.

A Okay.

THE COURT: Anything else?

MR. PLOTZ: Yes.

REDIRECT EXAMINATION

BY MR. PLOTZ:

Q Mr. DeFranco, did you receive a written request from Mr. Cicero for release of the plans for the PIUMPF merger?

A Well, we received a letter from Mr. Cicero asking for the release, as I recall it, of two plans, but I don't believe it related – or a relation was made to the union's merger.

Q All right. Did you receive from Mr. Cicero any written materials about PIUMPF?

A No.

Q Thank you.

THE COURT: Anything else?

MS. WARREN: I have nothing else.

THE COURT: All right. Then I think that that takes care of it, Mr. DeFranco. We will disconnect the telephone at this point.

THE WITNESS: Thank you, Your Honor.

THE COURT: Thank you.

(Telephonic testimony is concluded

* * *

[53] MARIA WIECK, PLAINTIFFS' WITNESS, SWORN

THE CLERK: Please state your name for the record.

THE WITNESS: Maria F. Wieck, and it's W-I-E-C-K.

DIRECT EXAMINATION

BY MR. PLOTZ:

Q Ms. Wieck, where do are you employed?

A At the PACE Benefit Funds.

Q And what is your position there?

A I'm the administrative officer.

Q And you say you're the administrative officer?

A Uh-huh.

Q What is PACE Benefit Funds?

A It covers PIUMPF, which is the PACE Industry Union Management Pension Fund, the PACE Industry 401(k) Fund, and the PACE industry Health & Welfare Funds.

[54] Q And how long have you been with PIUMPF?

A Since –

Q Excuse me, with PACE Benefit Funds?

A Since 1990, March of 1990.

Q Are you familiar with PIUMPF?

A Yes, I am.

Q Okay. In September of this year, did PIUMPF consider merging the Crown Vantage pension plans?

A Yes.

* * *

[57] Q Okay. Would you tell us how, in merger agreements, that – let me go back a little bit. Over the years, have other plans merged with PIUMPF?

A Yes.

Q What was the most recent merger?

A Actually, we have one with a closing date of tomorrow. It's the OCAW-PACE multi-employer plan.

Q How –

A With an effective date 1-12-02.

Q How many employees involved in that?

A Ten thousand.

Q And do you know the assets?

A The assets are $204 million.

Q Okay. Is that a – paper mill operations?

A No. Those are oil and chemical workers.

* * *

[155] ROBERT SCHAEFER,
DEFENDANTS' WITNESS, SWORN

THE CLERK: Please state your name for the record.

THE WITNESS: Robert Schaefer.

DIRECT EXAMINATION

BY MS. WARREN:

Q Mr. Schaefer, will you give us your full address for the record, too?

A 730 Shlauser Road in Harleysville, Pennsylvania.

Q And what's your position right now?

A I am president of Dietrich & Associates.

Q And what does Dietrich & Associates do?

A We are an annuity placement specialist.

Q And did you assist Crown Vantage in placing – in getting [156] annuities through annuity providers?

A Yes.

* * *

[219] THE COURT: All right. I have a few questions.

DIRECT EXAMINATION

BY THE COURT:

Q Let's start with the questions that Ms. Warren just asked you. I think you've testified that, in an annuity,

the participants or the annuitants no longer bear any of the risk of the investment of the pension plan. The annuity company or the insurance company does. Is that right?

A That's true.

Q Who bore the ultimate risk in Mutual Benefit Life? Are you familiar with that company?

[220] A Yes.

Q It was the annuitant, wasn't it? They were the ones that lost the money.

A Correct.

Q And who bore the ultimate risk in Executive Life?

A To the extent that there were benefits that weren't delivered, it would have been the participants of those.

Q Right. Okay. Let's take a look at Exhibit I, the second page of Exhibit I.

A Okay.

Q Mr. Schaefer, is it just a coincidence that the Hartford offered the highest surplus amount of the four insurance companies that made bids?

A Actually, the surplus is not an offer from Hartford, Your Honor. What that represents is the difference between the Hartford quote and the assets. So the –

Q Same hand, isn't it? I mean, the fact is that the quote was $84 million, so the surplus was higher than if the quote had been $85,693,000 like Travelers.

A Correct.

Q Right. Now, if you'd take a look at Exhibit N.

A Okay.

Q By the way, what exactly were you told by Crown Vantage? What was exactly – what was it that Mr. Cicero or someone else at Shearman & Sterling told you was the mission, your mission in [221] seeking out an annuity here?

A Our mission was to assist in all aspects of the placement.

Q What did that – what does that mean? What specifically were the – was the mission that you were given?

A To provide competitive quotes that were compliant with the plan provisions and assist in the selection process.

Q Was the word "reversion" ever mentioned to you?

A No.

Q All right. Now, I'm looking at the sheets on the ratings, the due diligence information on various insurance companies. The second sheet is the Hartford Life Insurance Company.

A Uh-huh.

MS. WARREN: Your Honor, are you on Exhibit N?

THE COURT: Yes, I am.

THE WITNESS: Yes.

BY THE COURT:

Q Now, tell me what on this sheet you thought was most important in terms of evaluating the financial wherewithal of Hartford.

A Well, it's not only the Hartford, but I guess evaluating the financial wherewithal of all the companies.

Q All right. Well, let's start with the Hartford, because that's the one they ended up picking and that's the one you suggested, I assume.

A We suggested Hartford because, again, all other things be-[222]ing relatively equal, that the combination of their cost and credit made sense.

Q Okay. So what on here about their credit strikes you as most important in evaluating the Hartford as the soundest of these companies?

A Well, we look at their investments and their –

Q What about their investments? What part of their investments do you look at that seem the soundest?

A Their minimal exposure to risky asset classes, noninvestment-grade bonds, nonaffiliate common stocks and delinquent and foreclosed mortgages. That shows us they're very conservative in their investments. We also look at capital and surplus to liabilities. That's a strong ratio. It's well within acceptable ranges. We look at their investments, per se. They don't have a lot of exposure in real estate. Those kinds of things. And I'm not sure that that clearly – again, we're not suggesting that Hartford is clearly better than anyone else, but as even the DOL

recognizes, there can be more than one safest available company, and Hartford I think is within the parameters.

Q The rating information on the Hartford, however, isn't as high as it is on Travelers, is it? Which is about four sheets down.

A Travelers has an extra – they're A++ by Best, versus an A+, which is just a minor – they're degrees of excellence, in [223] our estimation. They're all excellent. They're the same as the Moody's and they're the same as S&P. So a marginal edge from A.M. Best.

Q They have less invested in real estate than Travelers does, don't they? Or I guess – no, Hartford has zero and Travelers has almost zero. So they're about equal there. Their investment yield is higher than Hartford by a full percentage point, or better.

A Uh-huh.

Q Did you look at that?

A Yes.

Q So what is it about the Hartford that attracted you over the Travelers?

A Their cost.

Q It was an extra million?

A In our estimation, Hartford is a qualified company, so again we recommended taking advantage of their cost.

Q How about Met Life?

A Pretty much the same arguments, sir.

Q $181 billion in admitted assets. Over $15 billion in admitted assets in Hartford. Did that have any – play into any of your considerations?

A Again, it – certainly, that's a larger company, but we felt that Hartford was qualified.

Q But that isn't the criteria that you spelled out for what [224] you were looking for. You were looking for the soundest financial investment in which to put these pension assets. Isn't that right?

A Yeah. Yes.

Q So just being qualified, CNA was qualified. They were – and a minor – only slightly less sound, if you will, according to the rating agencies, right?

A Right, according to the ratings. Correct.

Q They would have paid – well, we don't know what they would have done because they were withdrawn from consideration, I guess.

What about the Principal? Same rating as Hartford. Just about the same mount of real estate. A little more, perhaps. I mean, all of these companies look about the same, don't they? So it really boiled down to price?

A That's correct. And that's our contention, that price can't be your primary consideration but it can be a consideration if other things are relatively equal.

Q Now, what would have happened if, in terms of your contract, because all I see from your engagement letter is this is what you're entitled to from the proceeds of the insurance, the annuity. In other words, you get a percentage of whatever it costs for the annuity, right?

A Correct.

Q Twenty basis points, as it is.

[225] A Twenty basis points.

Q Supposing – at the time at which you were retained, was it your understanding that this was what the company was going to do? They absolutely were going to pursue the standard termination route and purchase an annuity?

A Yes.

Q Had you known that they would have considered something else along the way, would you have taken the contract? The engagement?

A Probably.

Q What would have happened if they had decided to merge the plans instead of do the standard termination, in terms of what you were paid?

A I think we would have structured our compensation arrangement a little bit differently, where we – whereby we would have been guaranteed at least some percentage of that.

Q But the point is that as it now is, you – if they decided to merge rather than do a standard termination, or if they were forced to merge, you have no compensation package, do you?

A We've actually been paid by the insurance company. If this deal were to unravel, we – effectively, we have been paid.

Q Okay.

THE COURT: I don't have anything else. Do you have anything else?

MR. RAISNER: No.

[226] THE COURT: Anything else? Okay. You may step down. Thank you.

* * *

APPENDIX 7
Transcript of Proceedings: Jan. 7, 2002, Hearing re: Emergency Motion for Clarification of Preliminary Injunction (Adv. No. 01-4375AN, Bankr. N.D. Cal.)

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re	) **Case No. 00-41584 N**
	) **Case No. 00-41583 N**
CROWN VANTAGE, INC.,	) Jointly Administered
Debtor.	) Chapter 11
PACE INTERNATIONAL UNION,	) **Adversary Proceeding No. 01-4275 AN**
Plaintiffs,	) Oakland, California
	) Monday, January 7, 2002
vs.	) 2:00 p.m. Calendar
CROWN VANTAGE, INC., ET AL.,	) EMERGENCY MOTION FOR CLARIFICATION OF PRE-LIMINARY INJUNCTION
Defendants.	)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RANDALL J. NEWSOME,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

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Proceedings recorded by electronic sound recording; transcript produced by federally-approved transcription service.

[3] OAKLAND, CALIFORNIA, JANUARY 7, 2002, 2:01 P.M.

THE CLERK: All rise. This is the United States Bankruptcy Court for the Northern District of California, with the Honorable Randall J. Newsome presiding.

Please be seated.

THE COURT: Good afternoon. This is Crown Vantage, Inc.; PACE International Union versus Crown Vantage, Inc., et al. And this is a hearing on a motion for clarification of preliminary injunction. Would you like to make appearances?

MR. RAISNER: Good afternoon, Your Honor. Christian Raisner on behalf of the plaintiffs and the moving parties.

MS. GERMANO: Hello, Your Honor. Judith Germano of Shearman & Sterling on behalf of defendants.

THE COURT: All right. I have been over all the papers – as a matter of fact, I went over them twice – and I have to say that, at this point, I don't know what the disagreement is.

I do understand that there is some question about the $600,000 and refund of employee contributions and whether that's appropriate. I also understand that there is some question about lump sum distributions, and $300,000 in expenses.

But as I understand it, this property interest, this $5.1 million, is presently being held in a trust account that I guess is in the name of the pension fund and thus is not subject to IRS complications in terms of excise taxes. So is it – are we [4] just left with the question of these three items and whether or not they're appropriately payable?

MR. RAISNER: Generally so, I think, Your Honor. There is – we've tried to look at it closely. We don't – we're not really in a position to examine what all of the – all of them are in detail. And I will assume that, you know, many of them are probably correct. I mean, there will be some administrative expenses and so forth.

We do have a concern that we don't believe that the plan should be charged for expenses of the breach and so on, as we've mentioned in our papers.

THE COURT: I understand that, and –

MR. RAISNER: And –

THE COURT: And I think it's appropriate at this point for me to perhaps give you some of my views about where we are in terms of this court's jurisdiction as to the matters at issue.

It is true that, as to property that is solely and exclusively the pension fund's, that this court probably – I think it's at least subject to argument as to whether or not I have jurisdiction over any disputes involving that particular fund, since all of this arose in the bankruptcy and thus may very well be a core proceeding.

But putting that aside, there is now no doubt at all that under Section 541(a)(7) of the Bankruptcy Code, the debtors have [5] an interest in property as to this reversion. And as such, I believe that I have jurisdiction to determine to what extent the debtors should be entitled to that particular interest in property versus the – whether the property should in essence remain a part of the pension fund, albeit in a different form and in a different vessel, if you will.

So I think I do have jurisdiction over this particular dispute to the extent that the debtor has an interest in the property that's involved here.

As for, however, the expenses of the trust fund, of the pension fund, that is, or the refund of employee contributions or the lump sum distributions that are discussed in the defendants' moving papers, I don't really believe I do have or should have jurisdiction over those matters, except to the extent that the defendants – that being Crown Vantage and Crown Paper – are seeking to assert that

they should be paid out of those – that reversionary interest, whatever it is.

So perhaps I should hear from the defendant at this point as to all of those matters. Defendants.

MS. GERMANO: Your Honor, we agree that what is at issue is the amount that remains after the annuity is paid. It's also after all of the benefits are paid.

Right now, the plans are still ongoing. There are still expenses with regard to those plans. And a lot of the numbers that the plans have been dealing with are still estimates. So [6] the amount that is currently in the account is not necessarily the final number.

THE COURT: I understand that. And I guess the other – the one thing I wanted to inquire about of the defendants – as I said, I've read the letters twice. And I just want to make sure that – is it the case that – or, will you provide the breakouts that Mr. Raisner has requested – or maybe it was Mr. Plotz; I think it was Mr. Plotz – requested by way of his letter to you? Recent letter; I don't remember the date. Are you – is there any problem with giving them the breakdown of who's going to get what in terms of refunds of employee contributions, etcetera?

MS. GERMANO: I believe Your Honor is referring to the December 27th letter.

THE COURT: Probably.

MR. RAISNER: That's correct.

MS. GERMANO: And there is not a problem in the long term. The immediate problem is that we don't have – the debtors do not have all of the final numbers yet.

THE COURT: All right.

MS. GERMANO: And an hour ago, we had a call with Mr. Plotz, and Mr. Raisner was there just for the beginning of it. And we did discuss what some of the questions are of the fund. And we are discussing the information that we have, but we do not yet have final numbers.

[7] THE COURT: All right. When do you think you're going to have them?

MS. GERMANO: That's a question I'm actually not sure of. It may take some time to make sure that everything is finally paid out. The $600,000 –

THE COURT: Uh-huh.

MS. GERMANO: – that he asks about, and the, you now, December 17th letter, that's in the case of a reversion. But at this point, we don't yet know if there's going to be a reversion or if in some other way the money will go from the account to the beneficiary. And that's what we were hoping to get more guidance from plaintiffs on, as to how that may happen. So the $600,000 may not occur. It depends what happens in the – how the funds are paid out.

THE COURT: Well, you know, I wanted to mention something about that, because, Mr. Raisner, in your papers, you say, "Well, they only get that in the case of a reversion. They may not be entitled to it if somehow this money is folded into another plan." Don't you think the employees ought to have some say about that?

MR. RAISNER: Your Honor, the issue as we see it is this. ERISA provides – these monies, the $600,000

portion, is not benefits. Benefits, including benefits based on all employee contributions, must be fully paid under the statute 4044 before you even get here. And this provision really is at the [8] tail end, after all benefits have been – all benefits, liabilities, have been fully accounted for. Then the statute contemplates, "Well, what about the, you know, the residual assets?"

THE COURT: Right.

MR. RAISNER: And these residual assets, it's simply provision that says, "Well, before there is any reversion to an employer, let's have an additional reversion that goes based upon the contributions." But it's not – it's in addition to benefits. It's a little bit odd, but if one – until one thinks about, well, the situation with a defined contribution type of arrangement or 401(k) plan, you may put your money in there and invest it and hope for the best, but you might not get the – you know, there might be investment experience. It might be very large, it may not, depending on what the time is and the condition of the market and so on.

And that's quite different from a situation where the plan may also guarantee certain benefits, and it may guarantee benefits based upon those contributions. But that's different than getting, you know, the full amount that might have accrued as a result of the contribution.

And we puzzled over it for quite a while to try to figure this out, but the statute really makes it quite clear, if you follow it step by step, how the distribution of any residual assets should take place.

And so we're not trying to be heartless here or anything, [9] but $600,000 is a lot of money, and all of the

people are participants that we're contemplating that it be – that the money that's surplus go to, not simply some. So this is a reversion like others. We don't know who they are, where they're from, what positions they occupy and so forth, but we're simply looking at the statute.

More importantly, it appeared that the entire plan of distribution as set up was really one that was designed at the time of the breach, quite frankly. It dates back to the time of the purchase of the annuities, and it was never adjusted or changed.

THE COURT: Well, I don't know, I mean, –

MR. RAISNER: And at that point, we needed to have it.

THE COURT: I don't want to get wrapped up in an argument about whether or not these numbers are right or some other set of numbers is right or whether they should be adjusted. But I can tell you, let me just say even though I don't have, I don't think, subject matter jurisdiction to determine how the pay-out ought to go from this pension plan, if I have anything to say about it, and if in fact the statute can be read more than one way, those employees are going to get their contribution back before anybody gets anything. That includes PIUMPF or any other employee pension plan or any other employee benefit plan. Because I just think that's what's right. And if in fact the statute allows that to happen, then that's – if I have anything to say about it, that's what's going to happen. So I just [10] want everybody to be on notice that that's the way I feel about it.

Now, let's talk a little bit, because the papers made it somewhat clear, that people are talking – this is like two

trains passing in the night here in terms of the parties talking to one another. It's not even clear to me that we really even needed to have a hearing on this today based upon the last round of letter briefs.

How long does – do the defendants think it's going to take to get to the point where they're ready to do something in terms of paying these amounts, this $1.4 million, and then dealing with the reversion?

MS. GERMANO: I think that it may be two months before all of the liabilities are owed – or that, you know, what is now merely estimates are made into final numbers and then the benefits are all paid out. It could be two to three months. And at that point, everyone who would be entitled to the money would get the money from the beneficiary standpoint, and then we could deal with what amount is left over.

One concern is that there's additional litigation going on –

THE COURT: I understand that. There's an arbitration proceeding, as I understand it, that's been apparently requested under the collective bargaining agreements. Is that right, Mr. Raisner?

[11] MR. RAISNER: That's correct, Your Honor. That's not a part of this.

THE COURT: Now, where I'm leading with this is – and am I correct in understanding that the defendants have now consented to having my ruling on the preliminary injunction also be deemed a ruling on the merits?

MS. GERMANO: Yes, Your Honor.

THE COURT: All right.

MR. RAISNER: Well, Your Honor, as to that matter, we learned of their position shortly before the hearing, I think about an hour and a half ago. And we were told that they did not consent as to all defendants. This is a serious concern, because we have –

THE COURT: Well, let's stop.

MR. RAISNER: Yes.

THE COURT: Are you consenting as to all defendants?

MS. GERMANO: Does the preliminary injunction ruling apply as to all defendants?

THE COURT: As far as I'm concerned, it did. I thought it did.

MS. GERMANO: Then we consent that it – that it's to all defendants.

MR. RAISNER: So long as the findings in that proceeding apply to all, because it's a very big issue.

THE COURT: Well, I don't – certainly, that's what I [12] intended. I – and, you know, frankly, at this point, the corporate forms are pretty much nothing more than formalities. I mean, you had one board of directors for Crown Vantage and Crown Paper. They also happened to be the trustees of the pension fund, some of them or all of them. And so as far as I'm concerned, it would – it did apply to all of them, and – all of the defendants, and I think we now have a resolution.

MR. RAISNER: Well, –

THE COURT: That that's the case, and that they've consented to the merit, this being on the merits under Rule 65.

MR. RAISNER: Well, Your Honor, if – just to make – try to make the record clear here, not all of the defendants have been served. We did request that service be accepted on behalf of all of them. I believe appearances were stated on the record in a manner that might not make that clear.

THE COURT: Who are all of the defendants? I don't have the most – I don't have a – I'm not sure I have a copy of the complaint here, –

MR. RAISNER: I have one.

THE COURT: – but are there others other than the two corporations?

MR. RAISNER: Yes.

THE COURT: The trustees of Crown Vantage pension plans. I see, George B. Ames, Robert – James S. Watkinson, E. Lee Showalder (phonetic), Robert Ola (phonetic), Donna Weaver, [13] and William Walsh and Evan Davis. Those are all the trustees, right?

MR. RAISNER: The trustees and the directors.

THE COURT: Right.

MR. RAISNER: And in both capacities. And also the plans'.

THE COURT: All right.

MR. RAISNER: So our effort was to sue the fiduciaries. And I'm concerned – we have a concern about

it in that if the record is clear that there's a consent to accept service on behalf of these persons, because, of course, we're told over and over that debtor is going to be no more very shortly.

THE COURT: Well, who's going to, I mean, – let's just leave it at this. I – whether they were served or they weren't served, clearly, they had notice of the complaint. Evan Davis, as an officer of the company and the general counsel, was charged with notice. One of the boards of – members of the board of directors appeared as a witness. I am deeming these people served, or as having notice of this complaint, even if they were never formally served. And I – the preliminary injunction is going to apply to all of them.

Now, is that clear enough? All right.

MS. GERMANO: Very.

MR. RAISNER: That seems to cover it. I'm trying – I'm attempting to predict – I'm aware – we're aware that their [14] time to appeal has not run.

THE COURT: Well, that's just it. Everybody is attempting to predict what the next move's going to be on the other side, instead of trying to work together to get this resolved. And again, that's where I was leading up to. I am ready at some point, if you can't get this resolved, to send this to a mandatory mediation, because enough's enough.

I've made my findings very clear, as clear as I can make them, although we'll have to return in a second to the question of modifying the preliminary injunction, because I think it's appropriate to do so, although perhaps not in exactly the form that the plaintiff had suggested.

But I just don't see a need for everyone to spend more money and time on this when it seems to me that this ought to be capable of resolution by mediation. And that's exactly what I intend to do before I have one more hearing on this matter.

So if in fact somebody brings another issue before me on this particular problem, this particular complaint, you can count on my trying to find another judge or somebody, and that I direct that you both – that both sides participate in a meaningful way in a mediation as to the disputes that are remaining. That's something else I wanted to make clear.

Now, is there some reason why we can't just say that the assets of the pension plan will remain in the trust account that they are presently residing in, which is a money market, as I [15] understand it, making two-plus percent, until further order of the court?

MR. RAISNER: That's certainly acceptable to us. We're not asking that the funds be moved out of anyplace.

THE COURT: Right.

MR. RAISNER: We just don't want them to be distributed without a court order.

THE COURT: Is that a problem for the defendants?

MS. GERMANO: Your Honor, would that mean, then, that before any amount being paid to any beneficiary, we would need to have the court's permission?

THE COURT: With the exception of the question of – well, let's go back. If you intend ultimately – after a mandatory mediation, I might add – to challenge a distribution from the pension plan, you're going to have to do it someplace other than here. Because I don't believe, as I've already indicated, that I probably have jurisdiction over this matter.

As to who's going to get what's left after those distributions, clearly, under 541(a)(7), that's property of the estate; I do have jurisdiction to decide that issue. But as to what the actual reversion's going to be in terms of expenses that are paid out, refund of employee contributions, and so forth, I don't believe I have jurisdiction.

However, I don't think there's anyone that would say that I can't require the parties to mediate those issues, and I'm going [16] to do that.

So let's rephrase what I just said. That the property, the reversion, the $5.1 million left in the plan, will be – remain in a money market fund subject to an agreement of the parties as to how expenses and the other items of distribution are to be made, prior to the reversion being made, or subject to a court of competent jurisdiction making such a finding as to the appropriateness of distributions before the reversion takes place. Something along those lines.

MS. GERMANO: Your Honor, our concern with that language is that it then puts PACE, or PIUMPF, as a co-administrator of the plan.

THE COURT: All right. What's your suggestion?

MS. GERMANO: If we could –

THE COURT: I haven't seen any language, and you said you wanted to suggest some language, so have you sent that to me and I just don't have it?

MS. GERMANO: No, we have not. Can I send something to you this evening?

THE COURT: You can send anything to me that you want, but it seems to me that before you send anything to me, you send it to Mr. Raisner.

MS. GERMANO: Okay.

THE COURT: And I will expect that the parties negotiate in good faith based upon what I have just said. Because [17] what I have just said I don't think is going to change.

Now, if you're concerned about Mr. – about the union being – I didn't say anything about them being – having their name on the account or anything else. All I said was that, subject to making appropriate distributions either by agreement of the parties or pursuant to a court of competent jurisdiction making findings as to the appropriate distributions, that that money should stay in the account. I didn't say anything about the union becoming a co-trustee or the union having to be a signatory on the account or any of the rest of that, because obviously if you move any money in violation of this order, that's going to be a real problem for the – well, for the defendants in this case as well as for the attorneys for the defendants. So I don't have a problem with not putting them on any of the trust documents or the money market account.

MS. GERMANO: Right. Our concern is just that if they don't agree, for example, that our beneficiaries are owed a certain amount of money, and we feel that as plan

administrators it's required to pay out that money, then we would have to get the union to agree or go to another court and litigate it.

THE COURT: Well, and – that may be, but before you do you're going to go to mediation. I can tell you that right now. Regardless of whether I have jurisdiction to decide that issue or not, you're going to go to mediation on that before anybody sues anybody again on anything.

[18] MS. GERMANO: Okay.

MR. RAISNER: Your Honor, if I may, one small scruple respecting the order, which we would agree with, with the small provision that I'd like the record to be clear that the order is not assuming that a reversion – because it's a term of art – that a reversion will occur.

THE COURT: All right. That's – obviously, everybody has an interest in avoiding the excise tax problem, and so that's fine. That's the sort of thing that everybody could agree on, I hope.

Well, why don't you suggest some language, counsel, and send it to Mr. Raisner, and then you two work on it? I'm going to be out of town from Friday of this week until the 22nd of January. So I won't be available to sign anything until then, but it doesn't sound to me like there's any urgency to this at this point anyway.

MR. RAISNER: Well, Your Honor, if I may speak to that briefly. As a technical matter, and it does relate to the jurisdictional issue, one of our worries is that the defendants' letter, letters, both of their letters, have taken the position that after January 9 the – they can distribute the money as they see fit.

THE COURT: They've already said, Mr. Raisner, that there's no way they can make a distribution. They don't even know who they're supposed to distribute it to, apparently, or [19] how much it's supposed to be. They don't have a set of final numbers. There's not going to be anything happening on January the 9th. Is that correct, counsel?

MS. GERMANO: That's my understanding, Your Honor.

THE COURT: Well, that's what I'll expect, that nothing's going to happen on January the 9th, and that nothing's going to happen until the other side has received notice.

MS. GERMANO: Okay.

THE COURT: If you want to put that in the order, you can put that in the order too.

MR. RAISNER: If we may have an opportunity to be heard before the distribution, that would, I think, get us where we need to go.

THE COURT: Well, as long as everybody understands, as long as you understand, you may have an opportunity to be heard but it won't be here necessarily, by any means. You may have to go file another lawsuit against these people for this, if you insist. But I don't think I have jurisdiction over the trust fund assets to the extent that the trust fund assets are going to somebody other than these defendants.

MS. GERMANO: Your Honor, something that perhaps could work is if we had language that the estimated amount of any assets that will remain in the

pension trust after the distribution of other assets in accordance with ERISA and the terms of the pension plans, and that including –

[20] THE COURT: You work on it with Mr. Raisner. I'm not going to try to craft an order at this point, because I've already tried to craft an order and nobody liked the last paragraph of it. So you work on it. And I'll expect, frankly, that this get resolved, because I can't imagine why it shouldn't be.

Now, is there anything else I need to deal with this afternoon?

MR. RAISNER: Your Honor, on the issue of jurisdiction, if you would accept it, we would submit a brief on that issue.

THE COURT: Well, you can submit anything you want, –

MR. RAISNER: We believe the court does have a jurisdiction –

THE COURT: – but I'm not going to decide anything because I don't have it before me right now, and clearly the pension fund itself is a separate entity, governed by ERISA, governed by other statutory provisions, and I'm not going to – you can submit all the briefs you want but right now I've got nothing to decide.

MR. RAISNER: Very well. The – I will point out that –

THE COURT: First you have to file the lawsuit, and you can try to file it here, and then it'll get teed up for

– on the question of subject matter jurisdiction by way of a motion to dismiss under 12(b)(1), presumably, by them.

[21] MR. RAISNER: We have looked into that. The – just the technicalities I have to be concerned with is the plans that are involved here are in fact named parties. They are defendants.

THE COURT: That doesn't –

MR. RAISNER; And so it would seem to me that the order flows as to them. I mean, this is –

THE COURT: It flows as to them only to the extent that the pension plans are purporting to pay the other defendants anything. Whether or not – if you want to file a lawsuit in bankruptcy court as to the distributions that are at issue here and see whether or not they file a motion to dismiss under rule 12(b)(1) and then get a ruling from me as to whether I have jurisdiction, that's up to you, but it seems to me that that ought to be the last absolute resort that anyone makes here. Enough's enough.

I mean, I've made a ruling here. I thought it was comprehensive. I may – I was dead wrong about where the money was coming from, but that's partly because nobody explained to me how the reversion was going to work. But I think that the rest of this really ought to be something that if you can't agree on it at least ought to be susceptible to some sort of a mediation.

Anything else?

MS. GERMANO: We'll send proposed language –

MR. RAISNER: Nothing else, Your Honor. Thank you.

[22] THE COURT: What? Excuse me?

MS. GERMANO: We'll send proposed language –

THE COURT: Very good.

MS. GERMANO: – to plaintiff tomorrow and – discussion.

THE COURT: All right.

MS. GERMANO: Your Honor, the only other matter is that on either the 10th or the 11th, we were to submit to you proposals for what can be done with the –

THE COURT: Right.

MS. GERMANO: – money. Defendants were hoping to get something from plaintiff from which we could work in terms of the options that PACE and PIUMPF have for reaching these beneficiaries. We have not yet done that. We have not yet received anything from them. Should we still try to come up with something in a vacuum, or may we have more time to get something –

THE COURT: Well, that's fair enough. When are you going to get your proposal to them?

MR. RAISNER: Well, we had hoped to get some information from them which we thought would help, and I don't want to –

THE COURT: Well, let's – here we go again. It's, "Well, I want something from you, but I – "

MR. RAISNER: No, we are prepared to submit our proposal timely, –

[23] THE COURT: All right.

MR. RAISNER: – and we'd be happy to share it. It's not ready yet. It certainly will be ready by Thursday.

THE COURT: Good.

MR. RAISNER: And –

THE COURT: Then you submit yours by Thursday, and is there some reason why you can't submit something to – if I give you an extension till the following Thursday, for you to submit something by that time? In other words, for you to submit something by January the 17th?

MS. GERMANO: That would be fine, Your Honor.

THE COURT: All right.

MR. RAISNER: Your Honor, may I suggest that we take the occasion of the brief extension, we'll submit our proposal to them on Thursday – which is simply the soonest that we can get it done; we have people working on it – and then try to work out a joint proposal to make?

THE COURT: That would be wonderful. I have no illusions that that's possible at this point, but that would be wonderful.

MR. RAISNER: Well, I actually think it may – will be possible, based upon the ruling

THE COURT: Well, good.

MR. RAISNER: And –

THE COURT: Maybe you can get a stipulation on every[24]thing. But at this point, I'm not – I wouldn't bet on it. So I'll leave it at that.

Anything further to come before the court at this time?

MS. GERMANO: Not from defendants, Your Honor.

THE COURT: All right. Well, thank you very much, and we will stand adjourned for the day.

(Proceedings concluded at 2:29 p.m.)

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CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Kathy Rehling, Transcriber Date

APPENDIX 8
Section 12 of Crown Pension Plan No. 7, *included as* Appellant's Excerpts of Record, Vol. I, Tab 6 (No. 02-01407, N.D. Cal., filed Oct. 18, 2002)

SECTION 12.

Amendment or Termination of Plan

12.1 *Amendment.* The Company and the Plan Administrator intend, subject to the rights of amendment and termination contained in this Section 12, that this shall be a permanent plan for the exclusive benefit of the Employees who become Participants. The Plan Administrator may amend the Plan from time to time or terminate the Plan at any time, by written resolution of its Board of Directors (or the Executive Committee of such Board), but the Company shall not benefit thereby, as provided in subsection 10.4 and the Trust Agreement, and the duties or liabilities of the Trustee or insurance company shall not be increased without its written consent. The Plan Administrator reserves the right to amend, modify, or terminate the Plan at any time and from time to time, provided that the Plan Administrator shall have no right to amend, modify, or terminate the Plan in such a manner as would cause or permit any part of the Retirement Fund to be diverted to purposes other than for the exclusive benefit of the Member or, except as otherwise permitted by law, would cause or permit any part of the Retirement Fund to revert to the Company, and provided further that the duties or liabilities of the Trustee or insurance company hereunder shall not be increased without its written consent.

12.2 *Termination.* The Plan will terminate as to any group of Members upon the first to occur of the following:

(a) The date it is terminated by the Plan Administrator if thirty days' advance written notice of the termination is given to the Trustee.

(b) The date the Company is judicially declared bankrupt or insolvent.

(c) The dissolution, merger or consolidation of the Company or the sale by the Company of all or substantially all of its assets, except that in any such event arrangements may be made whereby the Plan as applied to the Company or to a group of Members of the Company will be continued by a successor to the Company or by the purchaser of all or substantially all of the Company's assets, in which case the successor or purchaser will be substituted for the Company under the Plan.

12.3 *Distribution on Termination.* In the event of the termination or partial termination of this Plan, the applicable portion of the Retirement Fund then held by the Trustee or insurance company shall be used and applied subject to the provisions of the Trust Agreement or insurance contract for the benefit of Members affected by such termination who have retired under the Plan (including a Member's spouse or beneficiary, if any) and Members who at the date of such termination are included in the Plan, in the following order:

First: That portion of the assets then held in the Retirement Fund allocable to the funding for the death benefits under subsection 8.3, as determined by the Actuary for the Plan, based upon records maintained with respect

to the contributions made to provide for the death benefits, the death benefits paid, and the proportionate allocation of Retirement Fund income, expense, and investment gains and losses thereto, shall be determined, and allocated to the extent that such portion of such assets shall be sufficient to provide the death benefits under subsection 8.3 to retired Members who shall have retired under the Plan prior to its termination proportionate to, but not in excess of, the actuarial liabilities for such death benefits without reference to the order or retirement.

Second: The balance of the Retirement Fund shall be allocated to provide for each Member an amount which is the Actuarial Equivalent of the total of his own contributions plus Credited Interest to the date of termination of the Plan less any retirement benefits theretofore received by him.

Third: The balance of the Retirement Fund shall be allocated to provide all or that part of his benefit payable under the Plan for each Member (or his spouse or beneficiary) who either:

(1) has begun to receive benefit payments at the date which is three years prior to the date of termination of the Plan, or

(2) could have begun to receive benefit payments at the date which is three years prior to the date of termination of the Plan if the Member would have been eligible to retire under subsections 4.2, 4.3

or 4.4 prior thereto and begin to receive benefit payments three years prior to the date of termination of the Plan,

which is equal to the smallest benefit (he was receiving or could have received) which would be provided for such person under the Plan based on its provisions as in effect during the five-year period ending on the date of termination of the Plan; and for this purpose the lowest benefit payment received under (1) above during the three years prior to the data of termination of the Plan shall be considered to be the benefit he was receiving at the date which is three years prior to termination, of the Plan. Allocation shall be made on a pro rata basis based on the then present value of the benefits under this paragraph Third, if assets are not sufficient to provide such benefits in full.

Fourth: The balance of the Retirement Fund shall be allocated to provide all or that part of his benefit under subsections 4.2, 4.3, 4.4, 6.3, 7.3 and 9.2 hereunder which is guaranteed under Section 4022 of the Act for each remaining Member (or his spouse or beneficiary) who qualifies under Third above but all of his benefit is not provided thereunder, or who does not qualify under Third above but who either:

(1) Has begun to receive benefit payments later than three years prior to the date of termination of the Plan, or

(2) Could have begun to receive benefit payments at the date of termination of the Plan if the Member would have been eligible to retire under subsections 4.2 or 4.3 or 4.4 or 6.3 or 7.3 at the date of termination of the Plan and be eligible to receive benefit payments thereunder, or

(3) Had attained eligibility for a termination benefit under subsection 9.2 at the date of termination of the Plan and would have been eligible to terminate his employment at the date of termination of the Plan and be eligible to receive termination benefit payments under Section 9.2 of the Plan.

Allocation shall be made on a pro rata basis based on the then present value of the benefits under this paragraph Fourth if assets are not sufficient to provide such benefits in full.

Fifth: The balance of the Retirement Fund shall be allocated to provide all or that part of his benefit hereunder for each Member (or his spouse or beneficiary) described in Third and Fourth above, which is not provided for under Third or Fourth above, in the following order of priority if such remaining assets are not sufficient to provide all of such part of such benefits for all such persons:

(1) To provide such part of the benefits which would be provided for such persons under the Plan based on

its provisions as in effect at the beginning of the five-year period ending on the date of termination of the Plan; and on a pro rata basis based on the then present value of such benefits under this paragraph (1) if such assets are not sufficient to provide such benefits described in this paragraph (1) in full; provided, however, if such assets are more than sufficient to provide such benefits described in this paragraph (1) in full then the assets available under this paragraph Fifth shall be allocated as provided in (2) below.

(2) To provide such part of the benefits which would be provided for such persons under the Plan based on its provisions as in effect as amended by the most recent Plan amendment effective during the five-year period ending on the date of termination of the Plan under which the assets under this paragraph Fifth are sufficient to provide such benefits in full; and with any assets remaining thereafter to be allocated to provide such part of the benefits which would be provided for such persons under the Plan based on its provisions as in effect as amended by each next succeeding Plan amendment effective during such five-year period.

Sixth: The balance of the Fund shall be allocated to provide all other benefits hereunder for each

Member which are not provided for above, accrued to the date of termination of the Plan, and in the order of priority described in Fifth (1) and (2) above if assets are not sufficient to provide such benefits in full.

Seventh: If any assets remain, they shall first be allocated to other groups of Members of the Company, if any, and if any assets remain thereafter they may revert to the Company as provided in subsection 10.4(a) hereof only if the Company has no other groups of Members remaining in the Plan.

Notwithstanding the foregoing, in the event the Plan terminates, or there is a spinoff of part of the Plan (in excess of the 3% of the assets permitted under Regulation Section 1.414(l)-1(n)(2)), within five years following the date of any merger of another plan into this Plan, and if the sum of the assets of this Plan after any such merger was less than the sum of the present values of the accrued benefits (whether or not vested) of both plans on a termination basis on the merger date, then a special schedule of benefits shall be created from the necessary (as identified by an enrolled actuary) data maintained by the Company and shall be inserted in and modify the allocation priorities set forth above in this subsection at the time of such Plan termination or spin-off, in accordance with Regulation Section 1.414(1)-l(e) through (j) and Regulation Section 2608.13.

12.4 *Form of Distribution.* The benefits from the allocations provided for in subsection 12.3 when made shall be fully vested and nonforfeitable as of the date of termination of the Plan, and any distributions from the Retirement Fund required to be made in accordance with

the foregoing paragraphs may be effectuated in the discretion of the Plan Administrator by the purchase of non-transferable annuities, or by continuing the Retirement Fund in existence, or by a cash settlement with any Member with the Member's consent.

12.5 *Merger or Consolidation.* In the event of and effective as of the date of merger or consolidation of the Plan with, or transfer of assets and liabilities of the Plan to, any other employee benefit plan, each Member in the Plan will (if the Plan had then terminated) receive a benefit immediately after the merger, consolidation or transfer which is not less than the benefit the Member would have been entitled to receive immediately before the merger, consolidation or transfer (if the Plan had then terminated).

12.6 *Sale of Company or Business Unit.* If the stock or assets of the Company, an Affiliate, or a business unit of the Company or an Affiliate are sold, the accrued benefits of Plan Members who are employees of the affected Company, Affiliate, or business unit may be transferred to a tax-qualified retirement plan of the purchaser. The transfer of assets shall be in full satisfaction of this Plan's obligation to provide benefits to the affected Members and their beneficiaries. The transfer will be made in compliance with applicable law.

APPENDIX 9
***Excerpts from* Transcript of Proceedings: Oct. 4, 2001, Hearing on Disclosure Statement & Motion on Procedures, *included as* Appellees' Supplemental Excerpts of Record, Exhibit 1 (No. 02-01407, N.D. Cal., filed Nov. 13, 2002)**

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

(OAKLAND DIVISION)

In re:

CROWN VANTAGE CROWN PAPER, INC.	Case No. 00-41584 N 00-41583 n (Jointly Administered)
	Chapter 11
	Oakland, California October 4, 2001 10:00 a.m.
Debtors. /	

TRANSCRIPT OF PROCEEDINGS
1) HEARING ON DISCLOSURE STATEMENT
2) MOTION ON PROCEDURES

(Filed Oct. 22, 2001)

BEFORE THE HONORABLE RANDALL J. NEWSOME
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors: SHEARMAN & STERLING
BY: FREDRIC SOSNICK, ESQ.
599 Lexington Avenue
New York, New York 10022

[2] For Pace International:	VAN BOURG, WEINBERG, ROBER & ROSENFELD BY: JOHN PLOTZ, ESQ. 180 Grand Avenue, Suite 1400 Oakland, California 94612
For the Creditors' Committee:	AKIN, GUMP, STRAISS, HAUER, & FELD, LLP BY: IRA S. DIZENGOFF, ESQ. 590 Madison Avenue New York, New York 10022
For Fort James:	SHEPPARD MULLIN BY: JOSEPH F. COYNE, JR., ESQ. 333 South Hope Street, Suite 4800 Los Angeles, California 90071
Court Reporter:	PHYLLIS L. WRIGHT UNITED STATES BANKRUPTCY COURT 1300 Clay Street. 3rd Floor Oakland, California 94612
Transcription Service:	Jo McCall Electronic Recording/Transcribing 3946 Pyle Avenue Santa Rosa, California 95407 Telephone: (707) 545-1838

* * *

[9] MR. PLOTZ: My name is John Plotz. I'm the [10] attorney for Pace International. Pace International as such, probably – it is not clear whether we represent the retirees or not, but certainly we, as a practical matter, can and I believe already have, gotten any number of retirees to sign up with us to represent them. And I just would like to – I was going to save this for a little bit later, but I think this may be the time to bring it up.

The Disclosure Statement and the proposed Plan say it's beyond impenetrable on what happens with the 18 ongoing and frozen pension plans. There is no plan here. It says the Debtors are analyzing whether some or all the plans, you know, can be merged or can be terminated voluntarily, involuntarily; we don't know what this is. I understand that. I mean I understand that negotiations have been going on with the Union about these plans. I was under the impression that they were successful negotiations, but I think nothing has been finalized.

But in any case, this Plan – I mean the piece of paper that is in front of the Court and was given to us, is a non-plan as far as the pension plans are concerned. And we are concerned that, you know, before there's a confirmation hearing with adequate time, assuming that there is no final agreement with the Union signed, sealed and delivered, we would like the Plan as to the pensions laid out in detail with the information backing it up so [11] that we can intelligently evaluate it.

THE COURT: Well, isn't it true – and I'm on real thin ice here talking about this – but isn't it true that those plans, those pensions plans, at least, cannot be wrapped up without the approval of the PVGC?

MR. PLOTZ: That's correct, Your Honor.

THE COURT: So whatever has to be done has to be done in accordance with PVGC rules and the statute, so doesn't that in essence protect the rights of your people you're representing?

MR. PLOTZ: Not entirely. It protects them insofar as the minimum standards that, you know, PVGC is looking for, but in the first place, we have to – this is a

bankruptcy proceeding; the Debtors in Possession need your approval, as I understand it, to take any action, at all in terms of the pensions. I mean, they are not only bankrupts but they're also the plan sponsor and have fiduciary duties towards the plan participants.

So as I understand it, subject to correction of course, is that the Debtors here have to go through two – leap over two hurdles. First, is this Court; and the second is PVGC. Obviously anything that is crafted here would be done with the notion that Gee, we have to go to PVGC; it's got to be acceptable to them down the line. And there's always the possibility that for some reason, [12] they'll put the kibosh on it. But in the meantime, the first step is, we need to get this Court's approval and preparatory to that, as a practical matter, there ought to be an agreement between the Union and the Debtors as to what's going to happen with these things. I believe that we're going to have it, actually.

THE COURT: I guess that – my question is, whether or not it's – it's not a question of agreeing with the Union; it's a question of complying with the terms of the pension plan; isn't it?

MR. PLOTZ: Yes. We agree with that totally.

THE COURT: So whether the Union agrees or doesn't agree, the fact is they have to comply with the pension plan, and they have to comply with the Bankruptcy Code, and they have to comply with ERISA and whatever else is governing law.

MR. PLOTZ: That's utterly correct, Your Honor, and I guess the bottom line on this point is that this piece

of paper doesn't explain how those three things are to be accomplished.

THE COURT: Well, maybe – you know, in the interest of simplicity, maybe that's what the Disclosure Statement should say is that the pension plans will be dealt with in accordance with the provisions of ERISA, the terms of the plan, and the Bankruptcy Code. And that's [13] probably about all that any – without making this even more difficult to understand – that's probably about all that can be expected in this document, I would think.

Mr. Sosnick, I'll let you be heard.

MR. SOSNICK: I think that's absolutely right, Your Honor. We can certainly put that additional sentence in it if that helps clarify. But the reason why it's not dealt with specifically in the Plan, other than by way of just disclosure, is here's what's happening because it doesn't affect the distribution one bit under the Plan. The fact is they're not Crown assets; they're not Crown Paper's assets. Crown Paper is acting as a fiduciary because they're Plan sponsor.

But if, for example, we were to come to the Court and say, Your Honor, here's what we'd like to do. We'd like to merge all the plans, and assume, let's say, that PVGC says that's fine, but Your Honor had a different view that you don't want us to merge the plans; you want us to do something else with them. In no way would that ever affect any distribution to anyone because those are all just Plan assets, and the plans are not – these are not over-funded plans. There's no –there's no –

THE COURT: Are they under-funded plans?

MR. SOSNICK: They are under-funded plans, and that's the struggle of how to deal with the PVGC on what to [14] do with these things. And one of the proposals that Mr. Plotz has alluded to is that the Union for the salaried plan – I'm sorry for the hourly plan, has their own pension plan, and one of the things that we're looking to do is to not in fact terminate the plans which may have some adverse consequences to the participants, but to try to merge them into the Union plan which we think would help, you know, benefit them.

But in no way, does any of this – any of these things help Crown Paper or its creditors, other than it's just taking – there's a trust fund. There's no – there's nothing really to say more in the Disclosure Statement or in the Plan, because it doesn't affect it.

THE COURT: Well maybe my suggestion then isn't so simpleminded after all. Maybe that's the way to handle it , because that's certainly the way it's going to be.

MR. PLOTZ: Your Honor, I don't disagree with anything that's been said. I'm having a little bit of a conceptual problem here. The Debtors have certain responsibilities towards the participants. The Debtor is in the role of Plan sponsor. Admittedly, truly, I mean I agree that nothing that the Debtors do is going to affect this bankruptcy in the sense of bringing more money in. However, there the Debtor is, having to make decisions in the real world. Are we going to do it this way, this way, [15] or the other way. The Debtors are in the jurisdiction of this Court.

THE COURT: Right. So we could add to the statement I've already made that they must comply with the Bankruptcy Code, the provisions of the pension plan,

all other applicable Federal and State law, subject to determination for compliance purposes of the Bankruptcy Court.

MR. PLOTZ: Right.

THE COURT: Well maybe that's the way it ought to be, certainly not in that phraseology but you get the drift.

MR. SOSNICK: Absolutely.

MR. PLOTZ: So that – yes, just to be finally clear and then I will sit down and let this bankruptcy proceed –

THE COURT: Okay.

MR. PLOTZ: – what will happen is that before an action is taken as to these pension plans, what that action is will be stated with, you know, information to evaluate it –

THE COURT: On notice –

MR. PLOTZ: – present it to this Court, and we'll have a chance to say –

THE COURT: Right.

[16] MR. PLOTZ: – yes, that's swell or not.

THE COURT: Okay.

MR. PLOTZ: Thank, Your Honor. Thank you, Mr. Sosnick.

THE COURT: Why don't we just put that into the Disclosure Statement, and I think that would be very helpful and that will get us over that hurdle.

MR. SOSNICK: We'd be happy to, Your Honor.

THE COURT: But I still want that letter obviously from the Creditor's Committee, and I want it – I don't want it to be one word longer than a page, because people won't read more than a page. It can be single-spaced, but it still has to be just a page. All right?

MR. DIZENGOFF: We'll do our best, Your Honor.

THE COURT: No, I'm serious about that. I don't want it more than one page long. So this is really going to be a challenge for the lawyers involved to write a one-page letter. All right?

MR. PLOTZ: May I offer my firm's editorial assistance if desired. I mean that seriously, because we bill these folks, and if you'd like –

THE COURT: Well am I wrong about what I'm saying? Am I –

MR. PLOTZ: You're absolutely right, Your Honor, a hundred percent right.

[17] THE COURT: Okay. One page, and I'm serious about that, not one word longer than one page, and it can't be in microscopic font either. It's got to be in 12 point font. And it can't be on 14-inch paper.

(Laughter.)

All right.

MR. SOSNICK: Covered all the tricks.

THE COURT: No –I doubt it. Not for a minute would I think that. All right. Mr. Sosnick, you want a confirmation hearing after 11-5-01?

MR. SOSNICK: Correct, Your Honor. Well actually, in calculating the dates, we think we would propose as having the voting deadline – by the time we get it out, we expect to get the Plan distributed by next Friday, which is October 12th, so we would expect a voting deadline of November 9th. And therefore we would hope to have a confirmation hearing on or about the 15th of November.

THE COURT: All right. Let's see what I can do for you. The 15th will not work. I can tell you that almost certainly. At least I can't give you a firm obligation or commitment, I should say, on the 15th. I may or may not be in town, but I can give you, let's see, a firm obligation – oh dear – at 2:00 o'clock on Tuesday November the 20th. That's the day – that's two days before [18] Thanksgiving, but at least it's not the day before Thanksgiving.

MR. SOSNICK: Would Your Honor have any earlier dates? The issue is that the way the – we don't start to get any money in from the banks holding the rest of the money until the Plan is confirmed.

THE COURT: Well, I don't have that week available – at least not yet. And you need to have a firm date and so – I could give you November the 19th at 2:00 o'clock.

MR. SOSNICK: That's fine, Your Honor.

THE COURT: All right. There are no obligations to this Disclosure Statement. I have read it over as best I can. I am not – I don't want to – I would not want

to be quizzed on certain of the provisions of the Disclosure Statement. It would appear to me as though it does, however, more than adequately provide information upon which a reasoned determination could be made whether to accept or reject the Plan. And so accordingly, the Disclosure Statement is hereby approved under Section 1125 of the Bankruptcy Code.

MR. SOSNICK: Very well. Thank you, Your Honor. We – I guess what we propose to do is we'll make the changes that Your Honor has talked about. We also had one additional language change, where we are in working [19] capital. We've got a – we had a call yesterday from Tembec U.S.A., re the exact landscape of that movant, to put in an additional sentence on that, and we could submit that to the Court by tomorrow.

THE COURT: All right. Well, just submit the order. Now, if the 19th is going to be the day, then it seems to me – let's set a firm date of November the 12th for the dates for ballots and objections. That's a week – obviously seven days before, approximately – I guess that's five business days. I'm not sure how you count them, but that's close enough.

MR. SOSNICK. Right. Okay.

THE COURT: So November the 12th will be for objections and ballots. The confirmation hearing will be November the 19th at 2:00 o'clock. There was another date in there, and I don't remember what it was.

MR. SOSNICK: That was the – that was the record date –

THE COURT: Right.

MR. SOSNICK: – which we would propose to be today, which is the date that we used to determine to send solicitation packages out.

THE COURT: All right. Fine.

* * *

APPENDIX 10
Minutes of Aug. 28, 2001, Meeting of Crown Vantage, Inc. Board of Directors, *included as* Appellees' Supplemental Excerpts of Record, Exhibit 2 (No. 02-01407, N.D. Cal., filed Nov. 13, 2002)

CROWN VANTAGE, INC.

Board of Directors

August 28, 2001

The Board of Directors of Crown, Vantage Inc. held a meeting by telephone conference call, chaired from the home of George James, 207 Walnut Street, San Francisco, California, on Monday, July 30, 2001 at 11:45 a.m. Eastern time. Present by telephone were Directors Messrs. George B. James (Chair), James S. Watkinson, F. Lee Showalter, Robert A. Olah, Ms. Donna Weaver, and Mr. William Walsh. Also present by telephone was Mr. Evan C. Davis, Senior Vice President Administration and General Counsel/Secretary.

Mr. James served as Chairman of the meeting and Mr. Davis kept the minutes of the meeting.

Quorum

The meeting was called to order by Chairman James, who noted a quorum was present. Chairman James reminded the Board that, when appropriate, the Board would be acting as the Board of Directors of Crown Paper Co., a wholly owned subsidiary of Crown Vantage, Inc.

Mr. Davis, at the request of the Chair reviewed the current status of the Company and the progress in the bankruptcy proceedings.

[REDACTED]

Pension Plans

The Union has offered to consider taking on all of the hourly pension plans into PIUMPF, the union multi employer plan. They are reviewing the data and will be notifying us if this is acceptable. Since this would be a favorable alternative we are delaying the quotes on annuities that are presently being developed until this is resolved.

[REDACTED]

Adjourn

There being no further business, and on motion duly made and seconded, the meeting was adjourned at 12:45 p.m.

/s/ Evan C. Davis
Evan C. Davis, Secretary

APPENDIX 11
Minutes of Sept. 26, 2001, Meeting of Crown Vantage, Inc. Board of Directors,
***included as* Appellees' Supplemental Excerpts of Record, Exhibit 3**
(No. 02-01407, N.D. Cal., filed Nov. 13, 2002)

CROWN VANTAGE, INC.

Board of Directors

September 26, 2001

The Board of Directors of Crown Vantage Inc. held a meeting by telephone conference call, chaired from the home of George James, in Hawaii on September 26, 2001 at 3:00 p.m. Eastern Time. Present by telephone were Directors Messrs. George B. James (Chair), James S. Watkinson, E. Lee Showalter, Ms. Donna Weaver, and Mr. William Walsh. Also present by telephone was Mr. Evan C. Davis, Senior Vice President Administration and General Counsel/Secretary and Robert Cicero of Shearman & Sterling.

Mr. James served as Chairman of the meeting and Mr. Davis kept the minutes of the meeting.

Quorum

The meeting was called to order by Chairman James, who noted a quorum was present. Chairman James reminded the Board that, when appropriate, the Board would be acting as the Board of Directors of Crown Paper Co., a wholly owned subsidiary of Crown Vantage, Inc.

Mr. Davis, at the request of the chair reviewed the current status of the Company and the progress in the bankruptcy proceedings.

[REDACTED]

Pension Plans

The Union has offered to take all of the hourly pension plans into PIUMPF, the union multi employer plan. This offer will be evaluated in comparison to the annuitization of plans when we receive final bids from the annuity providers. The final bids are anticipated on October 9, 2001. The following resolution was proposed and unanimously passed to facilitate the purchase of annuities if that is the most attractive alternative.

Resolution Regarding Negotiations for Annuity Contracts

WHEREAS, Crown Vantage Inc., a Virginia corporation (the Corporation) maintains for the benefit of its employees, the Crown Vantage Inc. Retirement Plan for Salaried and other Non-Bargaining Unit Employees. Crown Vantage Inc. Pension Plan No. 4, James River Pension Plan 1 – Supplement 1. Crown Vantage Inc. Pension Plan No. 7, Crown Vantage Inc. Pension Plan No. 10, Crown Vantage Inc. Pension Plan No. 11, Retirement Plan for Bargaining Unit Employees of Crown Vantage, Inc. at Richmond, Retirement Plan for Bargaining Unit Employees of Crown Vantage Inc. at Peninsular, Retirement Plan for Bargaining Unit Employees of Crown Vantage Inc. at Adams, Retirement Plan for Bargaining Unit Employees of Crown Vantage Inc. at Milford, Retirement Plan for Employees of Crown Vantage Inc. Rep. UPIU No. 1017 Port Huron, Crown Vantage Inc. Frozen

Pension Plan No. 4 and Frozen Retirement Plan for Bargaining Unit Employees of Crown Vantage Inc. at Peninsular (collectively referred to as the "Pension Plans"); and

WHEREAS, the Corporation intends to terminate the Pension Plans at a future date; and

WHEREAS, the Corporation may need to procure annuity contracts in order effectuate such termination and in order to provide benefits for participants in the Pension Plans;

NOW, THEREFORE BE IT RESOLVED, that the Secretary of the Corporation, subject to prior notification of the Board be, an hereby is authorized to take any and all actions that he may deem advisable in order to effectuate the procurement of annuity contracts to provide benefits for participants in the Pension Plans, including negotiating and purchasing such annuity contracts.

[REDACTED]

Adjourn

There being no further business, and on motion duly made and seconded, the meeting was adjourned at 4:00 p.m.

/s/ Evan C. Davis
Evan C. Davis, Secretary

APPENDIX 12
Minutes of Oct. 9, 2001, Meeting of Crown Vantage, Inc. Board of Directors, *included as* Appellees' Supplemental Excerpts of Record, Exhibit 4 (No. 02-01407, N.D. Cal., filed Nov. 13, 2002)

CROWN VANTAGE, INC.

Board of Directors

October 9, 2001

The Board of Directors of Crown Vantage Inc. held a meeting by telephone conference call, chaired from the home of George James, in Hawaii on October 9, 2001 at 4:30 p.m. Eastern Time. Present by telephone were Directors Messrs. George B. James (Chair), Robert Olah, James S. Watkinson, E. Lee Showalter and Ms. Donna Weaver. Also present by telephone was Mr. Evan C. Davis, Senior Vice President Administration and General Counsel/Secretary, Sandy Kester, Shaun Stuart of Dinsmore & Shohl and Robert Cicero of Shearman & Sterling.

Mr. James served as Chairman of the meeting and Mr. Davis kept the minutes of the meeting.

Quorum

The meeting was called to order by Chairman James, who noted a quorum was present. Chairman James reminded the Board that, when appropriate, the Board would be acting as the Board of Directors of Crown Paper Co., a wholly owned subsidiary of Crown Vantage, Inc.

Pension Plan Annuitization

Mr. Davis, at the request of the Chair introduced the subject of the annuitization of the Pension Plans that has been under consideration. We now have final quotations on the cost of this program and can make a decision.

Mr. Cicero then reviewed the information that had been previously faxed to the Board which documented several important factors to be considered in the choice of an annuity provider. By providing annuities to employees they receive the full benefits of the pension plans and the payment will be provided through the large insurance company. Our consultant assures us that all of the carriers under consideration are highly rated, well funded and qualified for this purpose.

A discussion was held comparing the various insurance companies regarding their capitalization, exposure to casualty loss in view of the events of September 11 and the relative position in the three rating systems provided. In view of the current economic conditions and the certainty that is provided by annuities it is appropriate to proceed.

All of the hourly plans can be included in the annuitization program with the exception of the five underfunded plans that are covered by the James River – PBGC Agreement. Two of the plans covered by this agreement will be released by the PBGC for this purpose. The Salaried Plan cannot be included in any scenario based on the current funding status. There is no excess funding that is capable of covering the underfunding of the Salaried Plan.

The offer of Pace International Union to merge the hourly plans into PIUMPF, their multi-employer plan was discussed. While it is anticipated that the Union will be

disappointed with the decision to annuitize the plans rather than effect a merger, the PBGC has expressed reservations at this course of action. While the PBGC agreed to release the two plans under the James River Agreement and any other claims against the estate under the annuitization scenario, there was no such agreement if we insisted on the merger.

The recommended carrier is Hartford based upon their superior ratings by three insurance rating systems and the other factors previously mentioned.

Motion: That we annuitize the hourly pension plans by accepting the bid of the Harford Insurance Company. (Showalter, Olah, Unanimous)

Robert Cicero will contact the PBGC to secure their agreement to the release of the two overfunded frozen plans subject to the James River Agreement and confirm their approval of this course of action.

[REDACTED]

Adjourn

There being no further business, and on motion duly made and seconded, the meeting was adjourned at 5:30 p.m.

/s/ Evan C. Davis
Evan C. Davis, Secretary

Supreme Court, U.S.
FILED
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No. 05-1448

In the

Supreme Court of the United States

JEFFREY H. BECK,
Liquidating Trustee of the Estates of
Crown Vantage, Inc. and Crown Paper Company,
Petitioner,

v.

PACE INTERNATIONAL UNION,
EDWARD J. MILLER, and JEFFREY D. MACEK,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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Counsel for Petitioner Jeffrey H. Beck

March 2, 2007

QUESTION PRESENTED

Whether an employer that sponsors and administers a single-employer defined benefit pension plan and that has elected to terminate the plan has a fiduciary obligation under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, to consider a union's proposal to merge the plan with a multiemployer plan.

LIST OF PARTIES AND CORPORATIONS

The parties to this proceeding are the same as those in the proceeding in the U.S. Court of Appeals for the Ninth Circuit: Petitioner Jeffrey H. Beck, Liquidating Trustee of the Estates of Crown Paper Company and Crown Vantage, Inc., and Respondents PACE International Union, Edward J. Miller, and Jeffrey D. Macek.

Corporate Disclosure Statement: Petitioner incorporates by reference the Corporate Disclosure Statement included in its Petition for Writ of Certiorari filed on May 10, 2006.

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No. 05-1448

In the
Supreme Court of the United States

JEFFREY H. BECK,
Liquidating Trustee of the Estates of
Crown Vantage, Inc. and Crown Paper Company,
Petitioner,

v.

PACE INTERNATIONAL UNION,
EDWARD J. MILLER, and JEFFREY D. MACEK,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The Ninth Circuit's opinions are available at 427 F.3d 668 (reported opinion) and 146 Fed. Appx. 917 (unreported opinion), and are reprinted at Pet. App. 1–24 and Pet. App. 25–28 respectively. The Ninth Circuit affirmed in part and vacated in part the unpublished opinion of the U.S. District Court for the Northern District of California, reprinted at Pet.

App. 29–50. The district court affirmed the preliminary injunction order entered by the U.S. Bankruptcy Court for the Northern District of California on February 5, 2002 (Pet. App. 74–76), which incorporated by reference oral findings of fact and law made on December 11, 2001 (Pet. App. 51–73). By stipulation of the parties approved by the bankruptcy court, the preliminary injunction order was deemed a final judgment on the merits. Pet. App. 78, 83.

JURISDICTIONAL STATEMENT

The Ninth Circuit entered its judgment and opinions on October 24, 2005, and denied Petitioner's timely petition for rehearing and suggestion of rehearing en banc on January 10, 2006. Petitioner's application to extend the time to file a petition for writ of certiorari through May 10, 2006, was granted by Justice Kennedy on February 21, 2006. Supreme Court Docket No. 05A769. The petition for a writ of certiorari was filed on May 10, 2006, and was granted on January 19, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The complete text of 29 U.S.C. §§ 1058, 1341, 1344, and 1412, and 29 C.F.R. § 4041.28, is set forth in the Appendix following this brief.

STATEMENT OF THE CASE

1. Petitioner Jeffrey H. Beck serves as Trustee of the Crown Paper Liquidating Trust, the bank-

ruptcy successor-in-interest to Crown Vantage, Inc., and Crown Paper Company (collectively, "Crown"). Crown operated a series of paper mills through which it employed approximately 2,600 workers, many represented by Respondent PACE International Union through collective bargaining agreements. Pet. App. 4, 55.

In 2000, Crown filed for Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the Northern District of California. Pet. App. 55. During the liquidation process, the Pension Benefit Guaranty Corporation ("PBGC") filed proofs of claim totaling millions of dollars representing the liability it would have to assume in order to take over Crown's various pension plans. Pet. App. 4, 56. Crown served as both sponsor and administrator for the plans. J.A. 17–18; Pet. App. 56.

In order to address the "stumbling block to plan confirmation" posed by the PBGC proofs of claim, in July 2001 Crown began investigating the possibility of effecting a "standard termination" of the pension plans through the purchase of an annuity, pursuant to 29 U.S.C. § 1341(b). Pet. App. 4, 56. Shortly thereafter, PACE proposed that Crown instead merge seventeen of Crown's hourly employee plans into the PACE Industrial Union Management Pension Fund (PIUMPF), a multiemployer plan PACE founded.[1] In August 2001, representatives for

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[1] A multiemployer plan is a collectively-bargained plan maintained by more than one employer, usually within the same or related industries, and a labor union. *See* 29

Crown and PACE met to discuss the possibility of merger. Pet. App. 57–58. Crown subsequently requested and received additional information regarding PACE's merger proposal. Pet. App. 58–59.

In late September 2001, Crown's Board of Directors met and reviewed preliminary annuitization bids. Pet. App. 59. Crown learned that annuitization of certain of the pension plans was possible and that the process might also create a "reversion" of residual plan assets to the company for its creditors' benefit.[2] Pet. App. 59. The PBGC agreed to release its claims against the Crown bankruptcy estate if Crown annuitized its pension plans. Pet. App. 62.

On October 9, 2001, Crown received final annuitization bids, which were set to expire in twenty-four hours. Pet. App. 60–61. Crown decided to merge eleven of the hourly-employee pension plans into a twelfth, Crown Plan No. 7.[3] Pet. App. 43–44. Crown then terminated the merged Crown Plan No. 7

U.S.C. § 1301(a)(3). These plans are often referred to as "Taft-Hartley plans."

[2] As a Debtor in bankruptcy, Crown had a fiduciary obligation to its creditors to maximize the assets of the estate. *See CFTC v. Weintraub*, 471 U.S. 343, 355 (1985).

[3] Responsibility for the five underfunded hourly plans included within PACE's merger proposal reverted to the Georgia Pacific Company, the successor of a prior sponsor of the plans, pursuant to a prior agreement between Georgia Pacific, Crown, and the PBGC. Pet. App. 61; Trans. of Proceedings, Nov. 27, 2001 (Bankr. Ct. Dkt. 22), at 92–93, 232–33, 270–71.

through the purchase of an $84 million annuity from the Hartford Life Insurance Company. Pet. App. 60–61. The annuitization of Crown Plan No. 7 through Hartford provided all plan participants with 100% of their accrued plan benefits, Pet. App. 66, and at the same time created a reversion of approximately $5 million in surplus plan assets that could be made available to Crown's creditors. Pet. App. 61. Crown signed a deposit agreement with Hartford on October 10, 2001, and formally purchased the annuity the next day. Pet. App. 61, 78.

2. After Crown terminated Crown Plan No. 7 through purchase of the Hartford annuity, Respondent PACE, on behalf of its members and former member plan participants, as well as Respondents Miller and Macek, on behalf of themselves and similarly situated Crown plan participants, filed an adversary proceeding in the Crown bankruptcy alleging that Crown violated its fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, by failing to adequately consider PACE's merger proposal. J.A. 13. The respondents sought, *inter alia*, injunctive relief (1) rescinding the purchase of the Hartford annuity and (2) preventing Crown from distributing the $5 million reversion to Crown creditors.[4] Pet. App. 7; J.A. 29.

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[4] PACE did not, however, seek the rescission of Crown's transfer of the five underfunded plans to Georgia Pacific. *See* J.A. 27–28.

After an evidentiary hearing held on November 29, 2001, the bankruptcy court issued oral findings of fact and law via telephonic conference on December 11, 2001. The bankruptcy court determined that Crown "gave no serious consideration" to PACE's merger proposal. Pet. App. 62. The bankruptcy court acknowledged that the decision to terminate a plan is a business decision not subject to a fiduciary duty, but noted that "both ERISA and the case law impose fiduciary responsibilities as to discretionary actions taken to implement that decision." Pet. App. 65 (citing *Waller v. Blue Cross of Cal.*, 32 F.3d 1337, 1342 (9th Cir. 1994)). The bankruptcy court held that Crown's decision between annuitizing the pension plans and merging them into PIUMPF constituted such a discretionary act.[5] Pet. App. 66. Though Crown's conduct in selecting and purchasing the Hartford annuity "almost surely would have passed muster" in the absence of PACE's merger offer, the bankruptcy court stated that once the merger option was raised, Crown had a fiduciary duty to

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[5] Though the bankruptcy court concluded that PACE's merger proposal served as a potential method of implementing the standard termination of Crown's pension plans, the bankruptcy court's findings of fact implicitly treated merger and standard termination as separate processes. *See* Pet. App. 57 ("[In summer 2001], both Pace and Crown viewed such *merger* as advantageous . . . [as] it wasn't at all clear to Crown that the plans had adequate assets to allow *standard termination*.") (emphasis added); *see also* Pet. App. 32 (district court noting "[t]he bankruptcy court found that [PACE's proposed] *merger* would be superior to *standard termination* in two ways") (emphases added).

explore it fully. Pet. App. 65. The bankruptcy court concluded that Crown violated its fiduciary duties by failing to adequately consider PACE's merger offer. *Ibid.*

The bankruptcy court partially granted PACE's motion for preliminary injunction, but declined to rescind the purchase of the Hartford annuity because of the substantial financial losses that would otherwise result. Pet. App. 66. Instead, the bankruptcy court ordered that the reversion proceeds be held in a separate account, and ordered the parties to report on the feasibility of investing the reversion into the Crown employee benefit plans. Pet. App. 67. The bankruptcy court subsequently issued a written order incorporating by reference its oral findings. Pet. App. 74–76. By stipulation of the parties, made at the court's request and with the court's approval, the preliminary injunction ruling was consolidated with final judgment on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2) and Federal Rule of Bankruptcy Procedure 7065. Pet. App. 78. The parties agreed to a mechanism for the distribution of the reversion for the benefit of the plan participants, the operation of which has been suspended during the ensuing appeals. Pet. App. 79–81.

3. Crown appealed to the district court. On appeal, Crown argued that merger with PIUMPF was not a method of terminating the plans and that, therefore, the choice between merger and termination was a plan sponsor decision not subject to ERISA fiduciary duties. Pet. App. 45. Though Crown also argued that ERISA's separate statutory

treatment of termination and merger precluded the possibility that merger could be a means of implementing standard termination, *compare* 29 U.S.C. § 1341 *with* § 1412, the district court held that the language of § 1341(b)(3)(A)(ii) was broad enough to encompass merger as a termination procedure that could, "in accordance with the provisions of the plan and any applicable regulation, otherwise fully provide all benefit liabilities under the plan." Pet. App. 46. The district court then considered whether the merger with PIUMPF could have been achieved in accordance with the plan's provisions, as required by § 1341, and determined that plan language posed no barrier to PACE's proposal because the plan included separate provisions permitting termination and merger. Pet. App. 47. Accordingly, the district court concluded that "Crown's Directors, failing to consider the merger option seriously while acting as the plan administrator, breached the fiduciary duties under ERISA." Pet. App. 48.

4. Crown appealed the district court's decision on the merits to the Ninth Circuit. PACE cross-appealed, challenging the district court's standing determination.

Crown again argued that its choice to terminate the pension plan rather than to merge it with the PIUMPF was a plan sponsor decision not subject to ERISA fiduciary obligations. Pet. App. 9. The Ninth Circuit concluded that 29 U.S.C. § 1341(b)(3)(A) was ambiguous and, therefore, that it permitted merger as a method of, rather than an alternative to, standard termination of a pension plan. Pet. App. 11–12. In so holding, the court rejected Crown's

arguments that ERISA's statutory treatment of merger and standard termination as separate processes foreclosed the possibility that merger is a valid method of effecting a standard termination under § 1341. Pet. App. 12–15. Having determined that merger was a permissible means of plan termination, the Ninth Circuit held that Crown had a fiduciary obligation to make the decision between the two "with an eye single to the interests of the participants and beneficiaries," Pet. App. 16–17 (quoting *Pilkington PLC v. Perelman*, 72 F.3d 1396, 1402 (9th Cir. 1995)), which Crown violated by failing to give PACE's merger proposal serious consideration. Pet. App. 20.

5. The Ninth Circuit denied Crown's petition for panel rehearing with suggestion of rehearing en banc, even though both the Department of Labor and the PBGC supported the petition as separate *amici curiae*. Pet. App. 84–85.

SUMMARY OF THE ARGUMENT

By holding that Crown had a fiduciary duty to consider PACE's merger proposal because merger constitutes a permissible means of implementing the termination of a single-employer plan, the Ninth Circuit misconstrued ERISA. Crown had no such fiduciary duty for two separate and independent reasons. First, a decision considering whether or not to merge a pension plan is always a non-fiduciary plan sponsor function, no matter when the decision is made. Second, ERISA's text and structure establish that merger is not a means of implementing the standard termination of a pension plan.

1. ERISA distinguishes between plan *sponsor* decisions, which are not subject to fiduciary duties, and plan *administrator* decisions, which are subject to fiduciary duties. Under ERISA, a person is a fiduciary only to the extent that the person fulfills certain statutorily defined functions. As the functions listed in ERISA's definition of fiduciary, 29 U.S.C. § 1002(21)(A), do not include decisions relating to plan design or structure, the decision whether to amend, modify, or terminate a pension plan is not subject to fiduciary duties. A decision concerning merger, like a decision concerning whether to amend or terminate a plan, relates to the plan's composition or design. Therefore, Crown's decision regarding PACE's merger proposal was a plan sponsor function not subject to fiduciary duties.

The Ninth Circuit recognized that a decision to terminate does not involve an ERISA fiduciary function, but held that merger was a *means* of termination, and that therefore Crown's decision regarding merger was a fiduciary function because it involved the "implementation" of the termination decision. In so doing, the Ninth Circuit erred. Under ERISA, the fiduciary status of an act is not based on when the act is performed, but rather is determined by the act's nature. Because a merger decision always involves considerations of plan structure or design, it is always a non-fiduciary plan sponsor decision, regardless of whether it is made before, in conjunction with, or after a decision to terminate.

2. a. The text of the ERISA provision governing plan termination, 29 U.S.C. § 1341, establishes that merger is an alternative to, rather than a method of

implementing, the standard termination of a pension plan. A standard termination under § 1341(b) requires that plan assets be "distributed" to plan participants either through the purchase of annuities from an insurer who in turn commits to providing the plan benefits, § 1341(b)(3)(A)(i), or through means that "otherwise *fully provide* all benefit liabilities under the plan." 29 U.S.C. § 1341(b)(3)(A)(ii) (emphasis added). When read in the context of the remainder of § 1341 and the text of § 1344, "otherwise fully provide" means to *pay* plan benefits in *full satisfaction* of plan liabilities. A merger under 29 U.S.C. § 1412 does not satisfy either of § 1341(b)(3)(A)(ii)'s textual requirements. Instead, merger merely *transfers* plan assets and liabilities to another plan, leaving the plan's benefit liabilities unsatisfied and subject to the ERISA regulatory regime. Therefore, merger cannot be a means of standard termination according to the plain terms of § 1341.

b. Having incorrectly found § 1341(b)(3)(A)(ii) to be ambiguous, the Ninth Circuit resolved that ambiguity by ascribing significance to Congress's inclusion of provisions governing merger and termination within the same ERISA title, Title IV. In so doing, the Ninth Circuit ignored fundamental canons of statutory construction. The inclusion of provisions governing termination and merger within the same ERISA title is insignificant. Rather than looking at the placement of provisions within ERISA, the Ninth Circuit should have looked to the structure of ERISA as a whole and considered whether ERISA contem-

plates that the separate provisions governing merger and termination will apply to the same processes.

ERISA's structure confirms that merger is an alternative to, rather than a method of, plan termination. ERISA goes so far as to define merger and termination *in contrast* to each other: a merger's validity under 29 U.S.C. § 1058 is predicated on whether the post-merger plan, were it immediately terminated, would grant each participant the same benefits as would a termination of the pre-merger plan, which is tautological if merger were a means of standard termination of a pension plan. ERISA also imposes different and contradictory procedural requirements on merger and termination. Furthermore, termination allows the reversion of surplus plan assets to the plan sponsor and plan participants, but merger does not allow either reversion to the plan sponsor or enhancement of the participants' accrued benefits. Therefore, ERISA's overall statutory scheme establishes that it is simply impossible for merger to serve as a means of termination.

Because merger is not a valid means of implementing the standard termination of a pension plan, Crown had no fiduciary obligation to consider PACE's merger proposal. The Ninth Circuit thus erred in imposing fiduciary duties on Crown's sponsor-level, non-fiduciary decision to reject PACE's merger proposal. This Court should reverse the Ninth Circuit's erroneous decision.

ARGUMENT

CROWN DID NOT HAVE A FIDUCIARY OBLIGATION TO CONSIDER PACE'S MERGER PROPOSAL.

The Ninth Circuit's decision should be reversed for two separate and independent reasons. First, a decision concerning merger is always a plan sponsor decision, regardless of when it is made, and ERISA does not subject such plan sponsor decisions to fiduciary duties. Second, because ERISA's text and structure establish that merger is not a means of implementing the standard termination of a single-employer plan, Crown could not have had a fiduciary duty to consider PACE's merger proposal.

A. A Decision Concerning Merger of a Pension Plan Is a Plan Sponsor Function Not Subject to ERISA Fiduciary Duties.

Under ERISA, "an employer is permitted to act both as plan sponsor and plan administrator." *Varity Corp. v. Howe*, 516 U.S. 489, 526 (1996) (Thomas, J., dissenting) (citing 29 U.S.C. § 1108(c)(3)); *see also* 29 U.S.C. § 1002(16)(A)(ii) (providing that a plan sponsor also serves as plan administrator if the plan instrument fails to designate a plan administrator). When acting in its capacity as a plan *sponsor*, an employer may pursue its business interests, even if such interests are contrary to the interests of plan members. *See Pegram v. Herdrich*, 530 U.S. 211, 225 (2000) (employer acting in its capacity as plan sponsor can modify plan to reduce benefits). When acting in its capacity as plan *administrator*, howev-

er, an employer is subject to ERISA's fiduciary duties. *Id.* at 223; *see also* 29 U.S.C. § 1002(21)(A).

Although ERISA allows employers such as Crown to wear two hats, one as a non-fiduciary plan sponsor and the other as a fiduciary plan administrator, the statute requires that an employer "with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions." *Pegram*, 530 U.S. at 225. "In every case charging a breach of ERISA fiduciary duty, then, the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, performing a *fiduciary function*) when taking the action subject to the complaint." *Id.* at 226 (emphasis added).

This Court's cases draw a bright line between a plan sponsor's non-fiduciary functions and a plan administrator's fiduciary functions. A plan sponsor's functions pertain to "the composition or design of the plan itself." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999). As this Court has explained, "employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans. When employers undertake these actions, they do not act as fiduciaries, but are analogous to the settlers of a trust." *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (citations and quotation marks omitted); *see also Hughes*, 525 U.S. at 444 ("ERISA's fiduciary duty requirement simply is not implicated where [a plan sponsor], acting as the Plan's settlor, makes a

decision regarding the form or structure of the Plan such as who is entitled to receive Plan benefits and in what amounts, or how such benefits are calculated."). The *Hughes* Court reaffirmed *Spink* and held that the act of amending a plan "does not constitute the action of a fiduciary." *Hughes*, 525 U.S. at 444.

This functional analysis of a plan sponsor's nonfiduciary acts "is rooted in the text of ERISA's definition of fiduciary." *Spink*, 517 U.S. at 890. Under ERISA, a "person"[6] is

> a fiduciary with respect to a plan *to the extent* (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A) (emphasis added). "[O]nly when filling certain defined *functions*, including the exercise of discretionary authority or control over plan management or administration, does a person become a fiduciary under [29 U.S.C. § 1002(21)(A)]." *Spink*, 517 U.S. at 890 (emphasis added, quotation marks omitted). "Because the defined functions in

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[6] ERISA defines a "person" as "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization." 29 U.S.C. § 1002(9).

the definition of fiduciary do not include plan design, an employer may decide to amend an employee benefit plan without being subject to fiduciary review." *Ibid.* (quotation marks and brackets omitted).

The Ninth Circuit recognized that Crown's decision to terminate its pension plans, as a decision involving plan structure, was a plan sponsor decision not subject to ERISA fiduciary duties. Pet. App. 9. Relying on *Waller v. Blue Cross of California*, 32 F.3d 1337 (9th Cir. 1994), however, the Ninth Circuit concluded that the *implementation* of a decision to terminate is a fiduciary function. From that premise, the Ninth Circuit reasoned that whether Crown had a fiduciary obligation to consider the union's merger proposal turned on "whether merger into a multiemployer plan is a permissible means of implementing a decision to terminate." Pet. App. 9.

The flaw in the Ninth Circuit's reasoning is its failure to apply ERISA's functional analysis to Crown's merger decision. Under ERISA, whether a particular act is a fiduciary function depends upon the nature of the act itself. In *Waller*, the court applied ERISA's functional analysis to determine that the choice of an annuity provider "is the quintessential exercise of 'discretionary control.'" *Waller*, 32 F.3d at 1342 (quoting 29 U.S.C. § 1002(21)(A)). Applied here, that same functional analysis establishes that the choice of whether or not to merge a pension plan is a sponsor-level business decision to which fiduciary duties do not attach, even if merger were a method of termination under ERISA (which it is not).

As both the Third and Sixth Circuits have recognized, under ERISA's functional analysis a decision regarding merger pertains to plan design or structure and is therefore, necessarily a non-fiduciary plan sponsor decision. *See Malia v. Gen. Elec. Co.*, 23 F.3d 828, 833 (3d Cir. 1994) ("Efforts by an employer to merge two pension plans do not invoke the fiduciary duty provisions of ERISA. Such duties do not attach to business decisions related to modification of the design of a pension plan, and in such circumstances the plan sponsor is free to act as an employer and not a fiduciary.") (quotation marks and citation omitted); *Sutter v. BASF Corp.*, 964 F.2d 556, 562 (6th Cir. 1992) ("BASF's decision to merge the two plans . . . clearly constituted the establishment or amendment of a pension plan and is therefore a business decision that should not be overturned by the court in the absence of violation of state or federal law."); *see also* 26 C.F.R. § 1.414(*l*)-1(b)(5)(iii) (acknowledging the "change in the benefit structure of a plan in conjunction with a merger").

Decisions regarding merger, like those regarding plan amendment, modification, or termination, impact fundamental matters of plan design and structure: the size of the plan, relevant pool of participants, and the scope of benefits the plan will provide on a going forward basis. Therefore, under ERISA, such decisions are non-fiduciary plan sponsor functions. *See Sutter*, 964 F.2d at 562 ("'There is a world of difference between administering a welfare plan according to its terms and deciding what those terms are to be. A company acts as a fiduciary in performing the first task, but not the second.'") (quoting

Musto v. Am. Gen. Corp., 861 F.2d 897, 911 (6th Cir. 1988)).

Rather than evaluating Crown's fiduciary obligations through ERISA's functional analysis, the Ninth Circuit effectively invented a new test that hinges on *when* a merger-related decision is made. Under the Ninth Circuit's analysis, a decision concerning merger made *before* a decision to terminate would be a plan sponsor function without fiduciary obligation as it involves plan structure and does not involve "implementation" of termination.[7] But a decision concerning merger made *after* a decision to terminate is a fiduciary decision, according to the Ninth Circuit, because it concerns the "implementation" of a termination decision.

The Ninth Circuit's temporal test is wrong as a matter of law. Because a decision concerning merger always implicates plan design or structure, such a decision as a matter of law is *always* a non-fiduciary sponsor decision under ERISA—whether made before, in conjunction with, or after a decision to terminate a plan. Nothing in ERISA's definition of fiduciary suggests that the same function can be non-fiduciary at one moment but fiduciary at a later moment. *See* 29 U.S.C. § 1002(21)(A). Rather, ERISA pro-

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[7] To conclude otherwise and instead read the Ninth Circuit's opinion as holding that decisions regarding merger are *always* subject to fiduciary scrutiny would only enlarge the scope of the Ninth Circuit's error. Decisions involving the adoption, modification, amendment, or termination of a plan are necessarily non-fiduciary plan sponsor functions. *See Hughes*, 525 U.S. at 443–44.

vides that whether an employer wears its fiduciary or non-fiduciary hat depends on whether the employer is "performing a fiduciary function," *Pegram*, 530 U.S. at 226, not *when* the function is performed. *See also Spink*, 517 U.S. at 890 (plan sponsors are generally free to adopt, modify, or terminate plans "for any reason *at any time*") (emphasis added). The Ninth Circuit has in essence repeated the same error that this Court reversed in *Hughes*: the imposition of fiduciary duties upon a non-fiduciary act based on a distinction unsupported by ERISA's definition of fiduciary functions. *See Hughes*, 525 U.S. at 444 (reversing Ninth Circuit ruling that fiduciary status hinged on *type* of pension plan based on fact that ERISA "makes no [such] distinction").

The practical effect of the Ninth Circuit's decision would be that an employer such as Crown in its non-fiduciary plan sponsor capacity could freely reject a union's merger proposal *before* making a decision to terminate, but would be required to reconsider as a fiduciary the same merger proposal *after* a decision to terminate, because under the Ninth Circuit's reasoning, plan-related decisions made after the decision to terminate are fiduciary functions regardless of their actual nature. Thus, whenever a plan sponsor opts to terminate, the Ninth Circuit's decision would require the employer (now wearing its hat as plan administrator, "implementing" the termination) to reconsider the same merger decision that it made as plan sponsor before termination. This strange result cannot be, and is not, compelled by ERISA's functional definition of fiduciary obligation.

In conclusion, whether or not to merge one pension plan with another is a decision involving plan structure just as much as a decision to establish, modify, amend, or terminate a pension plan. As such, it is a plan sponsor function that, under this Court's precedents, is simply not subject to fiduciary obligations. The Ninth Circuit therefore erred in imposing a fiduciary duty on Crown's decisions relating to PACE's merger proposal.

B. ERISA's Text and Structure Establish that Merger Is an Alternative to—Not a Means of—Standard Termination of a Pension Plan.

From its premise that the "implementation" of a termination is always a fiduciary function, the Ninth Circuit reasoned that whether Crown breached any fiduciary duty turned on "whether merger into a multiemployer plan is a permissible means of implementing a decision to terminate." Pet. App. 9. The court then concluded that under ERISA, merger can serve as a means of effecting plan termination. Pet. App. 13–15. In so holding, the Ninth Circuit misconstrued the text of ERISA's standard termination provision, and disregarded ERISA's structure.

The text of the statutory provision governing standard termination, 29 U.S.C. § 1341, precludes the possibility that merger can serve as a means of effecting the standard termination of a pension plan. In addition, the Ninth Circuit's termination-by-merger concept irreconcilably conflicts with ERISA as a whole, which both expressly and implicitly distin-

guishes between merger and termination as separate processes.

1. Plan Merger Cannot Serve as a Means of Standard Termination Because Merger Does Not Satisfy 29 U.S.C. § 1341's Textual Requirements.

Section 1341 provides that in a standard termination, a plan administrator "shall *distribute* the [plan] assets" by either:

> (i) purchas[ing] irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or
>
> (ii) in accordance with the provisions of the plan and any applicable regulations, *otherwise fully provid[ing] all benefit liabilities under the plan.* A transfer of assets to the [PBGC] in accordance with [29 U.S.C. § 1350] on behalf of a missing participant shall satisfy this subparagraph with respect to such participant.

29 U.S.C. § 1341(b)(3)(A) (emphasis added). Section 1341(b)(3)(A)(ii) is satisfied only through the lump-sum cash payment of benefit liabilities[8] directly to plan participants, *see* 29 C.F.R. § 4041.28(c)(2), or the transfer of assets to the PBGC on behalf of a missing participant. Yet the Ninth

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[8] ERISA defines "benefit liabilities" as "the benefits of employees and their beneficiaries under the plan." 29 U.S.C. § 1301(a)(16).

Circuit concluded that the provision "is ambiguous at best and neither explicitly nor implicitly prohibits merger into a multiemployer plan as a means of termination of a pension plan." Pet. App. 15. Because in the Ninth Circuit's view § 1341(b)(3)(A)(ii) "provides for alternative means of termination, so long as they are consistent with the plan provisions, applicable regulations, and 'otherwise fully provide all benefit liabilities under the plan,'" *ibid.*, the court concluded that merger could serve as one such means.

Statutory language "must be read in context and a phrase 'gathers meaning from the words around it.'" *Jones v. United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)); *see also Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) ("[W]ords and people are known by their companions."). When the terms of § 1341(b)(3)(A)(ii) are properly considered within the context provided by the remainder of § 1341 and the text of § 1344, it becomes apparent that the Ninth Circuit's conclusion is flawed. Merger into a multiemployer plan cannnot fulfill *either* of statutory requirements for standard termination: merger does not actually "distribute" plan assets to the plan beneficiaries, nor does it "fully provide all benefit liabilities."

First, ERISA requires that termination result in the direct or indirect *payment* of plan assets to plan participants. A standard termination under § 1341 requires that "the plan administrator shall *distribute* the assets in accordance with section 1344 of this title." 29 U.S.C. § 1341(b)(3)(A) (emphasis added). Section 1341 further establishes that to "distribute"

plan assets means to *pay* the assets to satisfy plan liabilities. *See* 29 U.S.C. § 1341(b)(3)(B) (requiring the plan administrator to certify to the PBGC "that the assets of the plan have been distributed in accordance with the provisions of subparagraph (A) so as to *pay* all benefit liabilities under the plan") (emphasis added). Section 1344 in turn specifies to whom the distribution of plan assets is to be made: the plan administrator must "*allocate* the assets of the plan (available to provide benefits) *among the participants and beneficiaries of the plan* [in a specified order of priority]." 29 U.S.C. § 1344(a) (emphases added). Properly understood in context, § 1341(b)(3)(A)(ii) requires that in a standard termination, plan assets actually be disbursed to plan participants and their beneficiaries.

Second, ERISA provides that a plan administrator, when effecting a standard termination of a pension plan through a method other than annuitization, must distribute the plan assets in a manner that, "in accordance with the provisions of the plan and any applicable regulations, otherwise *fully provide[s]* all benefit liabilities under the plan." 29 U.S.C. § 1341(b)(3)(A)(ii) (emphasis added). When read in the context of the remainder of § 1341 and the text of § 1344, "otherwise fully provide" means to *pay* plan benefits in *full satisfaction* of plan liabilities. The PBGC's regulation requiring the distribution to fully satisfy the plan's liabilities confirms this reading. *See* 29 C.F.R. § 4041.28(c)(1) (requiring plan administrator to "distribute plan assets in *satisfaction of all plan benefits*") (emphasis added). Because such payment fully satisfies the plan's

liabilities, the plan sponsor ceases paying premiums to the PBGC, *see* 29 U.S.C. § 1307(a) ("Premiums shall continue to accrue until a plan's assets are distributed pursuant to a termination procedure . . . ."), and the PBGC's insurance obligations terminate along with the plan. *PBGC v. LTV Corp.*, 496 U.S. 633, 639 (1990). A standard termination closes the regulatory book, as it fully provides the participants' plan benefits and extinguishes ERISA liability.

Section 1341(b)(3)(A)(ii)'s two requirements—actual *payment* to plan participants and full *satisfaction* of ERISA liabilities—are met when a lump sum payment in the appropriate amount is made to a plan participant. *See* 29 C.F.R. § 4041.28(c)(2) (providing for the calculation of lump sum payment to be made to plan participants in a standard termination in the absence of annuitization). Merger of a single-employer plan with a multiemployer plan, on the other hand, fails to satisfy *either* of these requirements.

In a merger under § 1412, plan assets are *not* distributed to beneficiaries and allocated according to § 1344. Instead, plan assets and liabilities are *transferred* to the multiemployer plan, where they are *not* allocated solely to the benefit of the original plan's participants. *See* 29 U.S.C. § 1412(a) ("A transfer of assets or liabilities between, or a merger of, a multiemployer plan and a single-employer plan shall satisfy the requirements of this section."); *see also* 26 C.F.R. § 1.414(*l*)-1(b)(2) ("The terms 'merger' or 'consolidation' means [sic] the *combining* of two plans into a single plan. . . . [A] merger or consol-

idation will not occur if two plans are not combined in a single plan, such as by using one trust which limits the availability of assets of one plan to provide benefits to participants and beneficiaries of only that plan.") (emphasis added). With one exception,[9] the mere transfer of plan assets within the ERISA statutory and regulatory regime cannot satisfy § 1341(b)(3)(A)'s requirement that plan assets be *distributed* to the plan participants.

Nor are participant benefit liabilities fully *satisfied* by a single-employer plan's merger into a multiemployer plan. Instead, the multiemployer plan offers only the *promise* to pay the same accrued benefits that were earned in the single-employer plan. *See* 29 U.S.C. § 1412(b) (participants' accrued benefits after merger of single-employer plan with multiemployer plan must equal accrued benefits before merger). The administrator of the merged plan continues to pay insurance premiums to the PBGC, *see* 29 U.S.C. § 1307(e)(1)(B), and the PBGC continues to insure the unsatisfied benefit liabilities transferred from the former single-employer plan to

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[9] The final sentence of § 1341(b)(3)(A)(ii) provides: "A transfer of assets to the [PBGC] in accordance with [29 U.S.C. § 1350] on behalf of a missing participant shall satisfy this subparagraph with respect to such participant." 29 U.S.C. § 1341(b)(3)(A)(ii). Under the *expressio unius* canon of statutory construction, this exception reinforces the general rule that transfers within the ERISA regime cannot satisfy standard termination's disbursement requirement, as the exception would be superfluous if all such transfers constituted disbursements within the meaning of § 1341(b)(3)(A)(ii).

the multiemployer plan. Because the assets of the single-employer plan are commingled in merger with the assets of a multiemployer plan, the ability of beneficiaries under the former single-employer plan to receive their full benefits from the merged multiemployer plan is subject to the vagaries of the continued health of the merged plan.[10] This is surely not consistent with § 1341 and § 1344.

The Ninth Circuit tacitly acknowledged that merger does not satisfy § 1341(b)(3)(A)(ii)'s textual requirements, but excused the noncompliance based on its erroneous view that annuitization pursuant to § 1341(b)(3)(A)(i) does not satisfy the requirement of "distribution" either:

> [T]he purchase of irrevocable commitments from an insurer to provide all benefit liabili-

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[10] For example, were the multiemployer plan to become insolvent and subsequently be terminated, the consequences to the plan participants of the former overfunded single-employer plan could be disastrous. If the multiemployer plan is not adequately funded, the sponsors of the plan would be required to reduce the benefits to which the participants of the single-employer plan formerly were entitled, *see* 29 U.S.C. § 1441, and as the PBGC's website explains, the PBGC's guarantee would not necessarily make up the shortfall. *See* http://www.pbgc.gov/workers-retirees/benefits-information/content/page14090.html. The participants in the formerly fully-funded single-employer pension plan simply would not be assured of receiving their full retirement benefits—a fact that establishes that plan merger does not "fully provide" plan participants with their benefit liabilities within the meaning of § 1341.

> ties under the plan, pursuant to 29 U.S.C. § 1341(b)(3), such as the annuity to be provided by Hartford Life in this case, does not appear to satisfy the distribution requirement any more than would a merger into a multiemployer plan. Both scenarios would involve a series of payments to plan beneficiaries over time, rather than a lump-sum payment at the time of termination.

Pet. App. 14–15. The Ninth Circuit's logic evidences a fundamental misunderstanding of the distribution requirement.

When an employer terminates a pension plan through the purchase of irrevocable commitments from an insurer pursuant to § 1341(b)(3)(A)(i), the plan's assets are distributed *outside* of the ERISA-regulated pension plan system to purchase annuity contracts that inure to the sole interest of the former plan participants. The payment of lump-sum disbursements to plan participants, the conventional method of terminating a plan under § 1341(b)(3)(A)(ii), similarly distributes the plan assets outside of the ERISA-regulated system. Merger, on the other hand, involves no such distribution. Instead, the plan assets remain *within* the ERISA regime, where they are *not* allocated solely for the original plan participants' benefit. By equating merger and annuitization, the Ninth Circuit disregarded the crux of the distribution requirement—that the plan assets are paid *outside* of the pension plan system.

In addition, to the extent that annuitization would not otherwise constitute a "distribution" for purposes of § 1341(b)(3)(A), Congress has expressly deemed annuitization such a "distribution" in § 1341(b)(3)(A)(i). Congress has not, however, similarly deemed merger a method of "distribution." Thus, merger's conceded failure to satisfy the distribution requirement of § 1341(b)(3)(A)(ii) should have led the Ninth Circuit to reject it as a potential means of implementing standard termination under § 1341(b)(3)(A)(ii).

In short, 29 U.S.C. § 1341(b)(3)(A)(ii) requires that in a standard termination, plan assets be distributed out of the ERISA-governed pension plan system to plan participants in a manner that fully provides the plan's benefit liabilities. Merger does not satisfy these statutory requirements. The Ninth Circuit therefore erred in holding that merger could serve as a means of implementing a standard termination under § 1341(b)(3)(A)(ii).

2. ERISA's Structure Confirms That Merger Is Not a Means of Termination.

After erroneously concluding that the text of 29 U.S.C. § 1341(b)(3)(A)(ii) is ambiguous as to whether merger is a permissible method of implementing a standard termination, the Ninth Circuit resolved its perceived ambiguity by noting that ERISA's separate provisions governing termination, 29 U.S.C. § 1341, and mergers between multiemployer and single-employer plans, 29 U.S.C. § 1412, are both included within ERISA Title IV, entitled "Plan Termination Insurance." Pet. App. 12. According to the

Ninth Circuit, "[i]t would have been logical for Congress to place § 1412 within Title IV of ERISA because, as [PACE] argue[s], one practical effect of a merger or complete transfer is that at least one pension plan will cease to exist." *Id.* at 12–13. As the "statutory language is unclear" as to "whether Congress intended to permit mergers into multiemployer plans as a means of termination under 29 U.S.C. § 1341(b)(3)(A)," *id.* at 13, placement of these two provisions within Title IV "clarifies the statutory text and supports the conclusion that mergers are a permissible means of termination." *Ibid.*

Though a court may look to the title or heading of a statutory provision when the statutory text is ambiguous, the "title of a statute is of use *only* when it sheds light" on the relevant text. *Carter v. United States*, 530 U.S. 255, 267 (2000) (emphasis added, brackets and quotation marks omitted). Here, the ERISA title heading relied on by the Ninth Circuit, "Plan Termination Insurance," sheds *no* light on the issue at hand: whether standard termination may be effected through merger.

Nor is it of any moment that § 1341 (governing termination) and § 1412 (governing merger) are contained within ERISA's expansive Title IV. Title IV contains six subtitles, each of which governs a variety of subjects.[11] Subtitle C, "Terminations,"

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[11] Subtitle A, "Pension Benefit Guaranty Corporation," establishes the PBGC; Subtitle B, "Coverage," governs coverage provided by the PBGC; Subtitle C, "Terminations," governs plan terminations; Subtitle D, "Liability," governs employers' liability under ERISA; Subtitle E,

contains § 1341, whereas Subtitle E, "Special Provisions for Multiemployer Plans," contains § 1412. That Title IV happens to contain the separate provisions governing terminations and mergers sheds no light on whether ERISA allows merger as a means of terminating a single-employer plan; indeed, this Court has previously declined to ascribe any significance to the placement of different ERISA provisions within the same title. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 84 (1995) ("[W]e do not think that Congress intended [ERISA's provisions governing informational requirements, 29 U.S.C. §§ 1021–1031] to be supplemented by a faraway provision [29 U.S.C. § 1102(b)(3)] in another part of the statute [but in the same Title I], least of all in a way that would lead to improbable results."). If anything, the placement § 1341 and § 1412 in separate *subtitles* of Title IV implies that the two provisions do *not* overlap, and that Congress's decision *not* to place § 1412

"Special Provisions for Multiemployer Plans," contains six parts (Part 1, "Employer Withdrawals," governs employer withdrawals from ERISA plans; Part 2, "Merger or Transfer of Plan Assets or Liabilities," governs plan mergers; Part 3, "Reorganization; Minimum Contribution Requirements for Multiemployer Plans," governs reorganization of ERISA plans; Part 4, "Financial Assistance," governs the PBGC's financial assistance to insolvent plans; Part 5, "Benefits After Termination," governs benefits paid by certain terminated plans; and Part 6, "Enforcement," governs civil enforcement of ERISA); Subtitle F, "Transition Rules and Effective Dates," governs effective dates and certain matters in the Internal Revenue Code.

within Subtitle C, "Terminations," establishes that merger is not a method of plan termination.

Rather than relying solely on Congress's placement of § 1341 and § 1412 within Title IV, the Ninth Circuit should have looked to the overall structure of ERISA to resolve any perceived ambiguity in the text of 29 U.S.C. § 1341(b)(3)(A)(ii). This Court's cases instruct that:

> Just as a single word cannot be read in isolation, nor can a single provision of a statute. As we have recognized: "Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."

Smith v. United States, 508 U.S. 223, 233–34 (1993) (quoting *United Savings Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)). This Court's holistic approach to statutory construction is all the more necessary in the ERISA context, because "ERISA is a comprehensive and reticulated statute . . . and is enormously complex and detailed." *Hughes*, 525 U.S. at 447 (citations and quotation marks omitted).

The Ninth Circuit's construction of 29 U.S.C. § 1341(b)(3)(A)(ii) as allowing for merger as a means

of termination is demonstrably not "compatible with the rest of the law," *Smith*, 508 U.S. at 234, because ERISA treats merger and termination as distinct and separate processess. Therefore, were the Ninth Circuit's reading correct, plan sponsors would be subjected to contradictory obligations and key ERISA provisions would be rendered meaningless.

First, ERISA expressly distinguishes between merger and termination by requiring, as a prerequisite to merger validity, that each plan participant be eligible to receive, in a hypothetical immediately-post-merger termination, the same benefits that the participant would have received had the original plan *terminated rather than merged*. *See* 29 U.S.C. § 1058 (barring merger "unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated)"); *see also Brillinger v. Gen. Elec. Co.*, 130 F.3d 61, 62 (2d Cir. 1997) ("Under [§ 1058], a merger may not cause reduction of the benefit below what it would be upon a hypothetical termination of the plan."). If merger is a *means* of termination, as the Ninth Circuit concluded, then § 1058 is circular at best; it makes no sense to compare the benefits guaranteed by hypothetical terminations conducted immediately *before* and *after* plan merger if merger *itself* constitutes the termination of a plan.

Second, different procedural requirements apply to termination and merger. In a termination, the

PBGC and the Internal Revenue Service approve the termination, and the plan administrator must comply with stringent notice requirements to participants *before* the distribution of plan proceeds. *See* 29 U.S.C. § 1341(a)(2). The required notice must inform participants that upon distribution the PBGC's guarantee is extinguished. 29 C.F.R. § 4041.23. By contrast, the PBGC's approval is not needed to effect a merger. Participants receive notice *after* the merger, 29 C.F.R. § 2525.104-4, and the content of the notice is different from a termination, because in a merger the PBGC's guarantee of benefit liabilities is transferred along with those liabilities to the merged plan. Were merger a valid form of termination, plan administrators would be required to comply with mutually exclusive procedural obligations.

Finally, and of particular relevance to this case, a standard termination under § 1341 *allows* for reversion to a plan sponsor of surplus plan assets attributable to the sponsor's funding. *See* 29 U.S.C. § 1344(d)(1); *Bigger v. Am. Commercial Lines, Inc.*, 862 F.2d 1341, 1345 (8th Cir. 1988) ("Under section 1344, a plan sponsor may recapture all surplus assets after a termination of a plan if certain criteria are satisfied.").[12] Similarly, to the extent that the

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[12] In allowing a plan sponsor to recover surplus plan assets attributable to the sponsor's funding, ERISA thereby encourages employers to generously fund pension plans. *See Hawkeye Nat'l Life Ins. Co. v. Avis*, 122 F.3d 490, 502 n.7 (8th Cir. 1997) (depriving employers of residual plan assets could encourage employers to underfund plans); *Chait v. Bernstein*, 835 F.2d 1017, 1027 (3d Cir.

surplus assets are attributable to any plan participant contributions, upon a standard termination plan participants are entitled not only to their accrued benefits, but also to the surplus assets attributable to their own contributions. *See* 29 U.S.C. § 1344(d)(3)(A).

Merger, on the other hand, does not permit any reversion of funds to an employer, because in a merger *all* assets of the merged funds are transferred to the acquiring fund for future satisfaction of benefit liabilities, and ERISA expressly bars any plan assets from inuring to the benefit of an employer in the absence of termination or other narrowly defined circumstances. *See* 29 U.S.C. § 1103(c) (except as provided in certain circumstances, including termination, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan"). Nor does merger allow the accrued benefits of plan participants to be increased by surplus assets attributable to participant contributions. *See Brillinger*, 130 F.3d at 63 (distinguishing termination from merger with regard to the disposition of surplus plan assets);

1988) (same). By reducing or eliminating plan sponsors' entitlement to the residual assets of overfunded pension plans, the Ninth Circuit decision discourages plan sponsors from generously funding their pension plans and validates the Seventh Circuit's observation that "[i]t is possible . . . for litigation about pension plans to make everyone worse off." *Cooper v. IBM Personal Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006) (Easterbrook, J.).

Malia, 23 F.3d at 829–30 (same). Thus, merger, which *precludes* reversion of surplus funds to the benefit of plan sponsors or plan participants, cannot be a means of termination, which *allows* reversion.

In short, termination and merger are different in kind under ERISA. The two procedures are governed by different provisions, subject to different requirements, and serve divergent purposes: termination results in the end of an ERISA-regulated plan and payment of plan assets outside of the ERISA framework, while merger results in transfer of the plan's assets and liabilities to another plan under the ERISA regime. Merger is therefore an alternative to the standard termination of a pension plan, rather than a method of implementing such a standard termination. Accordingly, upon deciding to terminate its pension plan, Crown did not have any fiduciary duty to consider PACE's merger proposal.

CONCLUSION

This Court should reverse the decision of the Ninth Circuit and remand with instructions that judgment be entered in favor of Crown.

Respectfully submitted,

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APPENDIX

29 U.S.C. § 1058

§ 1058. Mergers and consolidations of plans or transfers of plan assets

A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after the date of the enactment of this Act [enacted Sept. 2, 1974], unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). The preceding sentence shall not apply to any transaction to the extent that participants either before or after the transaction are covered under a multiemployer plan to which title IV of this Act applies.

29 U.S.C. § 1341

§ 1341. Termination of single-employer plans

(a) General rules governing single-employer plan terminations.

(1) Exclusive means of plan termination. Except in the case of a termination for which proceedings are otherwise instituted by the corporation as provided in section 4042 [29 U.S.C. § 1342], a single-employer plan may be terminated only in a standard termination under subsection (b) or a distress termination under subsection (c).

(2) 60-Day notice of intent to terminate. Not less than 60 days before the proposed termination date of a standard termination under subsection (b) or a distress termination under subsection (c), the plan administrator shall provide to each affected party (other than the corporation in the case of a standard termination) a written notice of intent to terminate stating that such termination is intended and the proposed termination date. The written notice shall include any related additional information required in regulations of the corporation.

(3) Adherence to collective bargaining agreements. The corporation shall not proceed with a termination of a plan under this section if the termination would violate the terms and conditions of an existing collective bargaining agreement. Nothing in the preceding sentence shall be construed as limiting the authority of the corporation to institute

proceedings to involuntarily terminate a plan under section 4042 [29 U.S.C. § 1342].

(b) Standard termination of single-employer plans.

(1) General requirements. A single-employer plan may terminate under a standard termination only if--

(A) the plan administrator provides the 60-day advance notice of intent to terminate to affected parties required under subsection (a)(2),

(B) the requirements of subparagraphs (A) and (B) of paragraph (2) are met,

(C) the corporation does not issue a notice of noncompliance under subparagraph (C) of paragraph (2), and

(D) when the final distribution of assets occurs, the plan is sufficient for benefit liabilities (determined as of the termination date).

(2) Termination procedure.

(A) Notice to the corporation. As soon as practicable after the date on which the notice of intent to terminate is provided pursuant to subsection (a)(2), the plan administrator shall send a notice to the corporation setting forth--

(i) certification by an enrolled actuary--

(I) of the projected amount of the assets of the plan (as of a proposed date of final distribution of assets),

(II) of the actuarial present value (as of such date) of the benefit liabilities (determined as of the proposed termination date) under the plan, and

(III) that the plan is projected to be sufficient (as of such proposed date of final distribution) for such benefit liabilities,

(ii) such information as the corporation may prescribe in regulations as necessary to enable the corporation to make determinations under subparagraph (C), and

(iii) certification by the plan administrator that--

(I) the information on which the enrolled actuary based the certification under clause (i) is accurate and complete, and

(II) the information provided to the corporation under clause (ii) is accurate and complete.

Clause (i) and clause (iii)(I) shall not apply to a plan described in section 412(i) of the Internal Revenue Code of 1986 [26 U.S.C. § 412(i)].

(B) Notice to participants and beneficiaries of

benefit commitments [liabilities]. No later than the date on which a notice is sent by the plan administrator under subparagraph (A), the plan administrator shall send a notice to each person who is a participant or beneficiary under the plan--

(i) specifying the amount of the benefit liabilities (if any) attributable to such person as of the proposed termination date and the benefit form on the basis of which such amount is determined, and

(ii) including the following information used in determining such benefit liabilities:

(I) the length of service,

(II) the age of the participant or beneficiary,

(III) wages,

(IV) the assumptions, including the interest rate, and

(V) such other information as the corporation may require.

Such notice shall be written in such manner as is likely to be understood by the participant or beneficiary and as may be prescribed in regulations of the corporation.

(C) Notice from the corporation of noncompliance.

(i) In general. Within 60 days after receipt of the notice under subparagraph (A), the corporation shall issue a notice of noncompliance to the plan administrator if--

(I) it determines, based on the notice sent under paragraph (2)(A) of subsection (b), that there is reason to believe that the plan is not sufficient for benefit liabilities,

(II) it otherwise determines, on the basis of information provided by affected parties or otherwise obtained by the corporation, that there is reason to believe that the plan is not sufficient for benefit liabilities; or

(III) it determines that any other requirement of subparagraph (A) or (B) of this paragraph or of subsection (a)(2) has not been met, unless it further determines that the issuance of such notice would be inconsistent with the interests of participants and beneficiaries.

(ii) Extension. The corporation and the plan administrator may agree to extend the 60-day period referred to in clause (i) by a written agreement signed by the corporation and the plan administrator before the expiration of the 60-day period. The 60-day period shall be extended as provided in the agreement and may

be further extended by subsequent written agreements signed by the corporation and the plan administrator made before the expiration of a previously agreed upon extension of the 60-day period. Any extension may be made upon such terms and conditions (including the payment of benefits) as are agreed upon by the corporation and the plan administrator.

(D) Final distribution of assets in absence of notice of noncompliance. The plan administrator shall commence the final distribution of assets pursuant to the standard termination of the plan as soon as practicable after the expiration of the 60-day (or extended) period referred to in subparagraph (C), but such final distribution may occur only if--

(i) the plan administrator has not received during such period a notice of noncompliance from the corporation under subparagraph (C), and

(ii) when such final distribution occurs, the plan is sufficient for benefit liabilities (determined as of the termination date).

(3) Methods of final distribution of assets.

(A) In general. In connection with any final distribution of assets pursuant to the standard termination of the plan under this subsection, the plan administrator shall distribute the assets in accordance with section 4044 [29 U.S.C. § 1344].

In distributing such assets, the plan administrator shall--

(i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or

(ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan. A transfer of assets to the corporation in accordance with section 4050 [29 U.S.C. § 1350] on behalf of a missing participant shall satisfy this subparagraph with respect to such participant.

(B) Certification to the corporation of final distribution of assets. Within 30 days after the final distribution of assets is completed pursuant to the standard termination of the plan under this subsection, the plan administrator shall send a notice to the corporation certifying that the assets of the plan have been distributed in accordance with the provisions of subparagraph (A) so as to pay all benefit liabilities under the plan[.]

(4) Continuing authority. Nothing in this section shall be construed to preclude the continued exercise by the corporation, after the termination date of a plan terminated in a standard termination under this subsection, of its authority under section 4003 [29 U.S.C. § 1303] with respect to matters relating to the termination. A certification under paragraph (3)(B) shall not affect the corpora-

tion's obligations under section 4022 [29 U.S.C. § 1322].

(5) Special rule for certain plans where cessation or change in membership of a controlled group.

(A) In general. Except as provided in subparagraph (B), if--

(i) there is transaction or series of transactions which result in a person ceasing to be a member of a controlled group, and

(ii) such person immediately before the transaction or series of transactions maintained a single-employer plan which is a defined benefit plan which is fully funded,

then the interest rate used in determining whether the plan is sufficient for benefit liabilities or to otherwise assess plan liabilities for purposes of this subsection or section 4042(a)(4) [29 U.S.C. § 1342(a)(4)] shall be not less than the interest rate used in determining whether the plan is fully funded.

(B) Limitations. Subparagraph (A) shall not apply to any transaction or series of transactions unless--

(i) any employer maintaining the plan immediately before or after such transaction or series of transactions--

(I) has an outstanding senior unsecured debt instrument which is rated investment grade by each of the nationally recognized statistical rating organizations for corporate bonds that has issued a credit rating for such instrument, or

(II) if no such debt instrument of such employer has been rated by such an organization but 1 or more of such organizations has made an issuer credit rating for such employer, all such organizations which have so rated the employer have rated such employer investment grade, and

(ii) the employer maintaining the plan after the transaction or series of transactions employs at least 20 percent of the employees located in the United States who were employed by such employer immediately before the transaction or series of transactions.

(C) Fully funded. For purposes of subparagraph (A), a plan shall be treated as fully funded with respect to any transaction or series of transactions if--

(i) in the case of a transaction or series of transactions which occur in a plan year beginning before January 1, 2008, the funded current liability percentage determined under section 302(d) [29 U.S.C. § 1082(d)] for the plan year is at least 100 percent, and

(ii) in the case of a transaction or series of transactions which occur in a plan year beginning on or after such date, the funding target attainment percentage determined under section 303 [29 U.S.C. § 1083] is, as of the valuation date for such plan year, at least 100 percent.

(D) 2 year limitation. Subparagraph (A) shall not apply to any transaction or series of transactions if the plan referred to in subparagraph (A)(ii) is terminated under section 4041(c) or 4042 [29 U.S.C. § 1341(c) or 1342] after the close of the 2-year period beginning on the date on which the first such transaction occurs.

(c) Distress termination of single-employer plans.

(1) In general. A single-employer plan may terminate under a distress termination only if--

(A) the plan administrator provides the 60-day advance notice of intent to terminate to affected parties required under subsection (a)(2),

(B) the requirements of subparagraph (A) of paragraph (2) are met, and

(C) the corporation determines that the requirements of subparagraphs (B) and (D) of paragraph (2) are met.

(2) Termination requirements.

(A) Information submitted to the corporation. As soon as practicable after the date on which the notice of intent to terminate is provided pursuant to subsection (a)(2), the plan administrator shall provide the corporation, in such form as may be prescribed by the corporation in regulations, the following information:

(i) such information as the corporation may prescribe by regulation as necessary to make determinations under subparagraph (B) and paragraph (3);

(ii) unless the corporation determines the information is not necessary for purposes of paragraph (3)(A) or section 4062 [29 U.S.C. § 1362], certification by an enrolled actuary of--

(I) the amount (as of the proposed termination date and, if applicable, the proposed distribution date) of the current value of the assets of the plan,

(II) the actuarial present value (as of such dates) of the benefit liabilities under the plan,

(III) whether the plan is sufficient for benefit liabilities as of such dates,

(IV) the actuarial present value (as of such dates) of benefits under the plan guaranteed under section 4022 [29 U.S.C. § 1322], and

(V) whether the plan is sufficient for guaranteed benefits as of such dates:

(iii) in any case in which the plan is not sufficient for benefit liabilities as of such date--

(I) the name and address of each participant and beneficiary under the plan as of such date, and

(II) such other information as shall be prescribed by the corporation by regulation as necessary to enable the corporation to be able to make payments to participants and beneficiaries as required under section 4022(c) [29 U.S.C. § 1322(c)]; and

(iv) certification by the plan administrator that--

(I) the information on which the enrolled actuary based the certifications under clause (ii) is accurate and complete, and

(II) the information provided to the corporation under clauses (i) and (iii) is accurate and complete.

Clause (ii) and clause (iv)(I) shall not apply to a plan described in section 412(i) of the Internal Revenue Code of 1986 [26 U.S.C. § 412(i)].

(B) Determination by the corporation of

necessary distress criteria. Upon receipt of the notice of intent to terminate required under subsection (a)(2) and the information required under subparagraph (A), the corporation shall determine whether the requirements of this subparagraph are met as provided in clause (i), (ii), or (iii). The requirements of this subparagraph are met if each person who is (as of the proposed termination date) a contributing sponsor of such plan or a member of such sponsor's controlled group meets the requirements of any of the following clauses:

(i) Liquidation in bankruptcy or insolvency proceedings. The requirements of this clause are met by a person if--

(I) such person has filed or has had filed against such person, as of the proposed termination date, a petition seeking liquidation in a case under title 11, United States Code [11 U.S.C. §§ 101 et seq.], or under any similar Federal law or law of a State or political subdivision of a State (or a case described in clause (ii) filed by or against such person has been converted, as of such date, to a case in which liquidation is sought), and

(II) such case has not, as of the proposed termination date, been dismissed.

(ii) Reorganization in bankruptcy or insolvency proceedings. The requirements of this clause are met by a person if--

(I) such person has filed, or has had filed against such person, as of the proposed termination date, a petition seeking reorganization in a case under title 11, United States Code [11 U.S.C. §§ 101 et seq.], or under any similar law of a State or political subdivision of a State (or a case described in clause (i) filed by or against such person has been converted, as of such date, to such a case in which reorganization is sought),

(II) such case has not, as of the proposed termination date, been dismissed, and

(III) such person timely submits to the corporation any request for the approval of the bankruptcy court (or other appropriate court in a case under such similar law of a State or political subdivision) of the plan termination, and

(IV) the bankruptcy court (or such other appropriate court) determines that, unless the plan is terminated, such person will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process and approves the termination.

(iii) Termination required to enable payment of debts while staying in business or to avoid unreasonably burdensome pension costs caused by declining workforce. The requirements of

this clause are met by a person if such person demonstrates to the satisfaction of the corporation that--

(I) unless a distress termination occurs, such person will be unable to pay such person's debts when due and will be unable to continue in business, or

(II) the costs of providing pension coverage have become unreasonably burdensome to such person, solely as a result of a decline of such person's workforce covered as participants under all single-employer plans of which such person is a contributing sponsor.

(C) Notification of determinations by the corporation. The corporation shall notify the plan administrator as soon as practicable of its determinations made pursuant to subparagraph (B).

(D) Disclosure of termination information.

(i) In general. A plan administrator that has filed a notice of intent to terminate under subsection (a)(2) shall provide to an affected party any information provided to the corporation under subsection (a)(2) not later than 15 days after--

(I) receipt of a request from the affected party for the information; or

(II) the provision of new information to the corporation relating to a previous request.

(ii) Confidentiality.

(I) In general. The plan administrator shall not provide information under clause (i) in a form that includes any information that may directly or indirectly be associated with, or otherwise identify, an individual participant or beneficiary.

(II) Limitation. A court may limit disclosure under this subparagraph of confidential information described in section 552(b) of title 5, United States Code [5 U.S.C. § 552(b)], to any authorized representative of the participants or beneficiaries that agrees to ensure the confidentiality of such information.

(iii) Form and manner of information; charges.

(I) Form and manner. The corporation may prescribe the form and manner of the provision of information under this subparagraph, which shall include delivery in written, electronic, or other appropriate form to the extent that such form is reasonably accessible to individuals to whom the information is required to be provided.

(II) Reasonable charges. A plan administra-

tor may charge a reasonable fee for any information provided under this subparagraph in other than electronic form.

(iv) Authorized representative. For purposes of this subparagraph, the term "authorized representative" means any employee organization representing participants in the pension plan.

(3) Termination procedure.

(A) Determinations by the corporation relating to plan sufficiency for guaranteed benefits and for benefit liabilities. If the corporation determines that the requirements for a distress termination set forth in paragraphs (1) and (2) are met, the corporation shall--

(i) determine that the plan is sufficient for guaranteed benefits (as of the termination date) or that the corporation is unable to make such determination on the basis of information made available to the corporation,

(ii) determine that the plan is sufficient for benefit liabilities (as of the termination date) or that the corporation is unable to make such determination on the basis of information made available to the corporation, and

(iii) notify the plan administrator of the determinations made pursuant to this subparagraph as soon as practicable.

(B) Implementation of termination. After the corporation notifies the plan administrator of its determinations under subparagraph (A), the termination of the plan shall be carried out as soon as practicable, as provided in clause (i), (ii), or (iii).

(i) Cases of sufficiency for benefit liabilities. In any case in which the corporation determines that the plan is sufficient for benefit liabilities, the plan administrator shall proceed to distribute the plan's assets, and make certification to the corporation with respect to such distribution, in the manner described in subsection (b)(3), and shall take such other actions as may be appropriate to carry out the termination of the plan.

(ii) Cases of sufficiency for guaranteed benefits without a finding of sufficiency for benefit liabilities. In any case in which the corporation determines that the plan is sufficient for guaranteed benefits, but further determines that it is unable to determine that the plan is sufficient for benefit liabilities on the basis of the information made available to it, the plan administrator shall proceed to distribute the plan's assets in the manner described in subsection (b)(3), make certification to the corporation that the distribution has occurred, and take such actions as may be appropriate to carry out the termination of the plan.

(iii) Cases without any finding of sufficiency. In any case in which the corporation determines that it is unable to determine that the plan is sufficient for guaranteed benefits on the basis of the information made available to it, the corporation shall commence proceedings in accordance with section 4042 [29 U.S.C. § 1342].

(C) Finding after authorized commencement of termination that plan is unable to pay benefits.

(i) Finding with respect to benefit liabilities which are not guaranteed benefits. If, after the plan administrator has begun to terminate the plan as authorized under subparagraph (B)(i), the plan administrator finds that the plan is unable, or will be unable, to pay benefit liabilities which are not benefits guaranteed by the corporation under section 4022 [29 U.S.C. § 1322], the plan administrator shall notify the corporation of such finding as soon as practicable thereafter.

(ii) Finding with respect to guaranteed benefits. If, after the plan administrator has begun to terminate the plan as authorized by subparagraph (B)(i) or (ii), the plan administrator finds that the plan is unable, or will be unable, to pay all benefits under the plan which are guaranteed by the corporation under section 4022 [29 U.S.C. § 1322], the plan administrator shall notify the corporation of such finding as soon as practicable thereafter. If the corporation

concurs in the finding of the plan administrator (or the corporation itself makes such a finding), the corporation shall institute appropriate proceedings under section 4042 [29 U.S.C. § 1342].

(D) Administration of the plan during interim period.

(i) In general. The plan administrator shall--

(I) meet the requirements of clause (ii) for the period commencing on the date on which the plan administrator provides a notice of distress termination to the corporation under subsection (a)(2) and ending on the date on which the plan administrator receives notification from the corporation of its determinations under subparagraph (A), and

(II) meet the requirements of clause (ii) commencing on the date on which the plan administrator or the corporation makes a finding under subparagraph (C)(ii).

(ii) Requirements. The requirements of this clause are met by the plan administrator if the plan administrator--

(I) refrains from distributing assets or taking any other actions to carry out the proposed termination under this subsection,

(II) pays benefits attributable to employer

contributions, other than death benefits, only in the form of an annuity,

(III) does not use plan assets to purchase irrevocable commitments to provide benefits from an insurer,-and

(IV) continues to pay all benefit liabilities under the plan, but, commencing on the proposed termination date, limits the payment of benefits under the plan to those benefits which are guaranteed by the corporation under section 4022 [29 U.S.C. § 1322] or to which assets are required to be allocated under section 4044 [29 U.S.C. § 1344].

In the event the plan administrator is later determined not to have met the requirements for distress termination, any benefits which are not paid solely by reason of compliance with subclause (IV) shall be due and payable immediately (together with interest, at a reasonable rate, in accordance with regulations of the corporation).

(d) Sufficiency. For purposes of this section--

(1) Sufficiency for benefit liabilities. A single-employer plan is sufficient for benefit liabilities if there is no amount of unfunded benefit liabilities under the plan.

(2) Sufficiency for guaranteed benefits. A single-employer plan is sufficient for guaranteed benefits

if there is no amount of unfunded guaranteed benefits under the plan.

(e) Limitation on the conversion of a defined benefit plan to a defined contribution plan. The adoption of an amendment to a plan which causes the plan to become a plan described in section 4021(b)(1) [29 U.S.C. § 1321(b)(1)] constitutes a termination of the plan. Such an amendment may take effect only after the plan satisfies the requirements for standard termination under subsection (b) or distress termination under subsection (c).

29 U.S.C. § 1344

§ 1344. Allocation of assets

(a) Order of priority of participants and beneficiaries. In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

(1) First, to that portion of each individual's accrued benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.

(2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.

(3) Third, in the case of benefits payable as an annuity--

(A) in the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the 3-year period ending on the termination date of the plan, to each such benefit, based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least,

(B) in the case of a participant's or beneficiary's benefit (other than a benefit described in subparagraph (A)) which would have been in pay

status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, to each such benefit based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least.

For purposes of subparagraph (A), the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period.

(4) Fourth--

(A) to all other benefits (if any) of individuals under the plan guaranteed under this title (determined without regard to section 4022B(a) [29 U.S.C. § 1322b(a)]), and

(B) to the additional benefits (if any) which would be determined under subparagraph (A) if section 4022(b)(5)(B) [29 U.S.C. § 1322(b)(5)(B)] did not apply.

For purposes of this paragraph, section 4021 [29 U.S.C. § 1321] shall be applied without regard to subsection (c) thereof.

(5) Fifth, to all other nonforfeitable benefits under the plan.

(6) Sixth, to all other benefits under the plan.

(b) Adjustment of allocations; reallocations; mandatory contributions; establishment of subclasses and categories. For purposes of subsection (a)--

(1) The amount allocated under any paragraph of subsection (a) with respect to any benefit shall be properly adjusted for any allocation of assets with respect to that benefit under a prior paragraph of subsection (a).

(2) If the assets available for allocation under any paragraph of subsection (a) (other than paragraphs (4), (5), and (6)) are insufficient to satisfy in full the benefits of all individuals which are described in that paragraph, the assets shall be allocated pro rata among such individuals on the basis of the present value (as of the termination date) of their respective benefits described in that paragraph.

(3) If assets available for allocation under paragraph (4) of subsection (a) are insufficient to satisfy in full the benefits of all individuals who are described in that paragraph, the assets shall be allocated first to benefits described in subparagraph (A) of that paragraph. Any remaining assets shall then be allocated to benefits described in subparagraph (B) of that paragraph. If assets allocated to such subparagraph (B) are insufficient to satisfy in full the benefits described in that subparagraph, the assets shall be allocated pro rata among individuals on the basis of the present value

(as of the termination date) of their respective benefits described in that subparagraph.

(4) This paragraph applies if the assets available for allocation under paragraph (5) of subsection (a) are not sufficient to satisfy in full the benefits of individuals described in that paragraph.

(A) If this paragraph applies, except as provided in subparagraph (B), the assets shall be allocated to the benefits of individuals described in such paragraph (5) on the basis of the benefits of individuals which would have been described in such paragraph (5) under the plan as in effect at the beginning of the 5-year period ending on the date of plan termination.

(B) If the assets available for allocation under subparagraph (A) are sufficient to satisfy in full the benefits described in such subparagraph (without regard to this subparagraph), then for purposes of subparagraph (A), benefits of individuals described in such subparagraph shall be determined on the basis of the plan as amended by the most recent plan amendment effective during such 5-year period under which the assets available for allocation are sufficient to satisfy in full the benefits of individuals described in subparagraph (A) and any assets remaining to be allocated under such subparagraph shall be allocated under subparagraph (A) on the basis of the plan as amended by the next succeeding plan amendment effective during such period.

(5) If the Secretary of the Treasury determines that the allocation made pursuant to this section (without regard to this paragraph) results in discrimination prohibited by section 401(a)(4) of the Internal Revenue Code of 1986 [26 U.S.C. § 401(a)(4)] then, if required to prevent the disqualification of the plan (or any trust under the plan) under section 401(a) or 403(a) of such Code [26 U.S.C. § 401(a) or 403(a)], the assets allocated under subsections (a)(4)(B), (a)(5), and (a)(6) shall be reallocated to the extent necessary to avoid such discrimination.

(6) The term "mandatory contributions" means amounts contributed to the plan by a participant which are required as a condition of employment, as a condition of participation in such plan, or as a condition of obtaining benefits under the plan attributable to employer contributions. For this purpose, the total amount of mandatory contributions of a participant is the amount of such contributions reduced (but not below zero) by the sum of the amounts paid or distributed to him under the plan before its termination.

(7) A plan may establish subclasses and categories within the classes described in paragraphs (1) through (6) of subsection (a) in accordance with regulations prescribed by the corporation.

(c) Increase or decrease in value of assets. Any increase or decrease in the value of the assets of a single-employer plan occurring during the period

beginning on the later of (1) the date a trustee is appointed under section 4042(b) [29 U.S.C. § 1342(b)] or (2) the date on which the plan is terminated is to be allocated between the plan and the corporation in the manner determined by the court (in the case of a court-appointed trustee) or as agreed upon by the corporation and the plan administrator in any other case. Any increase or decrease in the value of the assets of a single-employer plan occurring after the date on which the plan is terminated shall be credited to, or suffered by, the corporation.

(d) Distribution of residual assets; restrictions on reversions pursuant to recently amended plans; assets attributable to employee contributions; calculation of remaining assets.

(1) Subject to paragraph (3), any residual assets of a single-employer plan may be distributed to the employer if--

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

(2)

(A) In determining the extent to which a plan provides for the distribution of plan assets to the

employer for purposes of paragraph (1)(C), any such provision, and any amendment increasing the amount which may be distributed to the employer, shall not be treated as effective before the end of the fifth calendar year following the date of the adoption of such provision or amendment.

(B) A distribution to the employer from a plan shall not be treated as failing to satisfy the requirements of this paragraph if the plan has been in effect for fewer than 5 years and the plan has provided for such a distribution since the effective date of the plan.

(C) Except as otherwise provided in regulations of the Secretary of the Treasury, in any case in which a transaction described in section 208 [29 U.S.C. § 1058] occurs, subparagraph (A) shall continue to apply separately with respect to the amount of any assets transferred in such transaction.

(D) For purposes of this subsection, the term "employer" includes any member of the controlled group of which the employer is a member. For purposes of the preceding sentence, the term "controlled group" means any group treated as a single employer under subsection (b), (c), (m) or (o) of section 414 of the Internal Revenue Code of 1986 [26 U.S.C. § 414(b), (c), (m) or (o)].

(3) (A) Before any distribution from a plan pursuant to paragraph (1), if any assets of the plan attributable to employee contributions remain af-

ter satisfaction of all liabilities described in subsection (a), such remaining assets shall be equitably distributed to the participants who made such contributions or their beneficiaries (including alternate payees, within the meaning of section 206(d)(3)(K) [29 U.S.C. § 1056(d)(3)(K)]).

(B) For purposes of subparagraph (A), the portion of the remaining assets which are attributable to employee contributions shall be an amount equal to the product derived by multiplying--

(i) the market value of the total remaining assets, by

(ii) a fraction--

(I) the numerator of which is the present value of all portions of the accrued benefits with respect to participants which are derived from participants' mandatory contributions (referred to in subsection (a)(2)), and

(II) the denominator of which is the present value of all benefits with respect to which assets are allocated under paragraphs (2) through (6) of subsection (a).

(C) For purposes of this paragraph, each person who is, as of the termination date--

(i) a participant under the plan, or

(ii) an individual who has received, during the 3-year period ending with the termination date, a distribution from the plan of such individual's entire nonforfeitable benefit in the form of a single sum distribution in accordance with section 203(e) [29 U.S.C. § 1053(e)] or in the form of irrevocable commitments purchased by the plan from an insurer to provide such nonforfeitable benefit,

shall be treated as a participant with respect to the termination, if all or part of the nonforfeitable benefit with respect to such person is or was attributable to participants' mandatory contributions (referred to in subsection (a)(2)).

(4) Nothing in this subsection shall be construed to limit the requirements of section 4980(d) of the Internal Revenue Code of 1986 [26 U.S.C. § 4980(d)] (as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990 [enacted Nov. 5, 1990]) or section 404(d) of this Act [29 U.S.C. 1104(d)] with respect to any distribution of residual assets of a single-employer plan to the employer.

(e) Bankruptcy filing substituted for termination date. If a contributing sponsor of a plan has filed or has had filed against such person a petition seeking liquidation or reorganization in a case under title 11, United States Code, or under any similar Federal law or law of a State or political subdivision, and the case has not been dismissed as of the termination

date of the plan, then subsection (a)(3) shall be applied by treating the date such petition was filed as the termination date of the plan.

[(f)](e) Valuation of section 4062(c) liability for determining amounts payable by corporation to participants and beneficiaries.

(1) In general. In the case of a terminated plan, the value of the recovery of liability under section 4062(c) [29 U.S.C. § 1362(c)] allocable as a plan asset under this section for purposes of determining the amount of benefits payable by the corporation shall be determined by multiplying--

(A) the amount of liability under section 4062(c) [29 U.S.C. § 1362(c)] as of the termination date of the plan, by

(B) the applicable section 4062(c) [29 U.S.C. § 1362(c)] recovery ratio.

(2) Section 4062(c) recovery ratio. For purposes of this subsection--

(A) In general. Except as provided in subparagraph (C), the term "section 4062(c) [29 U.S.C. § 1362(c)] recovery ratio" means the ratio which--

(i) the sum of the values of all recoveries under section 4062(c) [29 U.S.C. § 1362(c)] determined by the corporation in connection with plan terminations described under subparagraph (B), bears to

(ii) the sum of all the amounts of liability under section 4062(c) [29 U.S.C. § 1362(c)] with respect to such plans as of the termination date in connection with any such prior termination.

(B) Prior terminations. A plan termination described in this subparagraph is a termination with respect to which--

(i) the value of recoveries under section 4062(c) [29 U.S.C. § 1362(c)] have been determined by the corporation, and

(ii) notices of intent to terminate were provided (or in the case of a termination by the corporation, a notice of determination under section 4042 [29 U.S.C. § 1342] was issued) during the 5-Federal fiscal year period ending with the third fiscal year preceding the fiscal year in which occurs the date of the notice of intent to terminate (or the notice of determination under section 4042 [29 U.S.C. § 1342]) with respect to the plan termination for which the recovery ratio is being determined.

(C) Exception. In the case of a terminated plan with respect to which the outstanding amount of benefit liabilities exceeds $ 20,000,000, the term "section 4062(c) recovery ratio" means, with respect to the termination of such plan, the ratio of--

(i) the value of the recoveries on behalf of the

plan under section 4062(c) [29 U.S.C. § 1362(c)], to

(ii) the amount of the liability owed under section 4062(c) [29 U.S.C. § 1362(c)] as of the date of plan termination to the trustee appointed under section 4042 (b) or (c) [29 U.S.C. § 1342(b) or (c)].

(3) Subsection not to apply. This subsection shall not apply with respect to the determination of--

(A) whether the amount of outstanding benefit liabilities exceeds $ 20,000,000, or

(B) the amount of any liability under section 4062 [29 U.S.C. § 1362(c)] to the corporation or the trustee appointed under section 4042 (b) or (c) [29 U.S.C. § 1342(c)].

(4) Determinations. Determinations under this subsection shall be made by the corporation. Such determinations shall be binding unless shown by clear and convincing evidence to be unreasonable.

29 U.S.C. § 1412

§ 1412. Transfers between a multiemployer plan and a single-employer plan

(a) General authority. A transfer of assets or liabilities between, or a merger of, a multiemployer plan and a single-employer plan shall satisfy the requirements of this section.

(b) Accrued benefit of participant or beneficiary not lower immediately after effective date of transfer or merger. No accrued benefit of a participant or beneficiary may be lower immediately after the effective date of a transfer or merger described in subsection (a) than the benefit immediately before that date.

(c) Liability of multiemployer plan to corporation where single-employer plan terminates within 60 months after effective date of transfer; amount of liability, exemption, etc.

(1) Except as provided in paragraphs (2) and (3), a multiemployer plan which transfers liabilities to a single-employer plan shall be liable to the corporation if the single-employer plan terminates within 60 months after the effective date of the transfer. The amount of liability shall be the lesser of--

(A) the amount of the plan asset insufficiency of the terminated single-employer plan, less 30 percent of the net worth of the employer who maintained the single-employer plan, determined

in accordance with section 4062 or 4064 [29 U.S.C. § 1362 or 1364], or

(B) the value, on the effective date of the transfer, of the unfunded benefits transferred to the single-employer plan which are guaranteed under section 4022 [29 U.S.C. § 1322].

(2) A multiemployer plan shall be liable to the corporation as provided in paragraph (1) unless, within 180 days after the corporation receives an application (together with such information as the corporation may reasonably require for purposes of such application) from the multiemployer plan sponsor for a determination under this paragraph--

(A) the corporation determines that the interests of the plan participants and beneficiaries and of the corporation are adequately protected, or

(B) fails to make any determination regarding the adequacy with which such interests are protected with respect to such transfer of liabilities.

If, after the receipt of such application, the corporation requests from the plan sponsor additional information necessary for the determination, the running of the 180-day period shall be suspended from the date of such request until the receipt by the corporation of the additional information requested. The corporation may by regulation prescribe procedures and standards for the issuance of determinations under this paragraph. This para-

graph shall not apply to any application submitted less than 180 days after the date of enactment of the Multiemployer Pension Plan Amendments Act of 1980 [enacted Sept. 26, 1980].

(3) A multiemployer plan shall not be liable to the corporation as provided in paragraph (1) in the case of a transfer from the multiemployer plan to a single-employer plan of liabilities which accrued under a single-employer plan which merged with the multiemployer plan, if, the value of liabilities transferred to the single-employer plan does not exceed the value of the liabilities for benefits which accrued before the merger, and the value of the assets transferred to the single-employer plan is substantially equal to the value of the assets which would have been in the single-employer plan if the employer had maintained and funded it as a separate plan under which no benefits accrued after the date of the merger.

(4) The corporation may make equitable arrangements with multiemployer plans which are liable under this subsection for satisfaction of their liability.

(d) Guarantee of benefits under single-employer plan. Benefits under a single-employer plan to which liabilities are transferred in accordance with this section are guaranteed under section 4022 [29 U.S.C. § 1322] to the extent provided in that section as of the effective date of the transfer and the plan is a successor plan.

(e) Transfer of liabilities by multiemployer plan to single-employer plan.

(1) Except as provided in paragraph (2), a multiemployer plan may not transfer liabilities to a single-employer plan unless the plan sponsor of the plan to which the liabilities would be transferred agrees to the transfer.

(2) In the case of a transfer described in subsection (c)(3), paragraph (1) of this subsection is satisfied by the advance agreement to the transfer by the employer who will be obligated to contribute to the single-employer plan.

(f) Additional requirements by corporation for protection of interest of plan participants, beneficiaries and corporation; approval by corporation of transfer of assets or liabilities to single-employer plan from plan in reorganization; covered transfers in connection with termination.

(1) The corporation may prescribe by regulation such additional requirements with respect to the transfer of assets or liabilities as may be necessary to protect the interests of plan participants and beneficiaries and the corporation.

(2) Except as otherwise determined by the corporation, a transfer of assets or liabilities to a single-employer plan from a plan in reorganization under section 4241 [29 U.S.C. § 1421] is not effective unless the corporation approves such transfer.

(3) No transfer to which this section applies, in connection with a termination described in section 4041A(a)(2) [29 U.S.C. § 1341a(a)(2)] shall be effective unless the transfer meets such requirements as may be established by the corporation to prevent an increase in the risk of loss to the corporation.

29 CFR § 4041.28

§ 4041.28. Closeout of plan.

(a) Distribution deadline.

(1) In general. Unless a notice of noncompliance is issued under § 4041.31(a), the plan administrator must complete the distribution of plan assets in satisfaction of plan benefits (through priority category 6 under section 4044 of ERISA and part 4044 of this chapter) by the later of –

(i) 180 days after the expiration of the PBGC's 60-day (or extended) review period under § 4041.26(a); or

(ii) If the plan administrator meets the requirements of § 4041.25(c), 120 days after receipt of a favorable determination from the IRS.

(2) Revocation of notice of noncompliance. If the PBGC revokes a notice of noncompliance issued under § 4041.31(a), the distribution deadline is extended until the 180th day after the date of the revocation.

(b) Assets insufficient to satisfy plan benefits. If, at the time of any distribution, the plan administrator determines that plan assets are not sufficient to satisfy all plan benefits (with assets determined net of other liabilities, including PBGC premiums), the plan administrator may not make any further distribution of assets to effect the plan's termination and must promptly notify the PBGC.

(c) Method of distribution.

(1) In general. The plan administrator must, in accordance with all applicable requirements under the Code and ERISA, distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer or in another permitted form.

(2) Lump sum calculations. In the absence of evidence establishing that another date is the "annuity starting date" under the Code, the distribution date is the "annuity starting date" for purposes of –

(i) Calculating the present value of plan benefits that may be provided in a form other than by purchase of an irrevocable commitment from an insurer (e.g., in selecting the interest rate(s) to be used to value a lump sum distribution); and

(ii) Determining whether plan benefits will be paid in such other form.

(3) Selection of insurer. In the case of plan benefits that will be provided by purchase of an irrevocable commitment from an insurer, the plan administrator must select the insurer in accordance with the fiduciary standards of Title I of ERISA.

(4) Participating annuity contracts. In the case of a plan in which any residual assets will be distributed to participants, a participating annuity contract may be purchased to satisfy the requirement

that annuities be provided by the purchase of irevocable commitments only if the portion of the price of the contract that is attributable to the participation feature –

(i) Is not taken into account in determining the amount of residual assets; and

(ii) Is not paid from residual assets allocable to participants.

(5) Missing participants. The plan administrator must distribute plan benefits to missing participants in accordance with part 4050.

(d) Provision of annuity contract. If plan benefits are provided through the purchase of irrevocable commitments –

(1) Either the plan administrator or the insurer must, within 30 days after it is available, provide each participant and beneficiary with a copy of the annuity contract or certificate showing the insurer's name and address and clearly reflecting the insurer's obligation to provide the participant's or beneficiary's plan benefits; and

(2) If such a contract or certificate is not provided to the participant or beneficiary by the date on which the post-distribution certification is required to be filed in order to avoid the assessment of penalties under § 4041.29(b), the plan administrator must, no later than that date, provide the participant and beneficiary with a notice that includes –

(i) A statement that the obligation for providing the participant's or beneficiary's plan benefits has transferred to the insurer;

(ii) The name and address of the insurer;

(iii) The name, address, and telephone number of the person designated by the insurer to answer questions concerning the annuity; and

(iv) A statement that the participant or beneficiary will receive from the plan administrator or insurer a copy of the annuity contract or a certificate showing the insurer's name and address and clearly reflecting the insurer's obligation to provide the participant's or beneficiary's plan benefits.

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IN THE

Supreme Court of the United States

JEFFREY H. BECK, Liquidating Trustee of the Estates of Crown Vantage, Inc. and Crown Paper Company,
Petitioner,

v.

PACE INTERNATIONAL UNION, EDWARD J. MILLER, and JEFFREY D. MACEK,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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29 C.F.R. § 4041.6(a) (1996)	42
Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 3(c)(3), 94 Stat. 1208 (1980)	50
1987 Pension Protection Act, Pub. L. No. 100-203, Sec. 9313(a)(2)(C)(i), 101 Stat. 1330 (1987)	47
Single Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, 100 Stat. 82 (1986)	27

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2A Scott on Trusts (4th ed.1987)	14
IV Scott on Trusts (4th ed. 1989)	34
30 Williston on Contracts (4th ed.)	26
46 Fed. Reg. 9532 (Jan. 28, 1981)	28, 42, 46
53 Fed. Reg. 1904 (Jan. 22, 1988)	42, 46
56 Fed. Reg. 28638 (June 21, 1991)	24, 25
57 Fed. Reg. 59206 (Dec. 14, 1992)	42
60 Fed. Reg. 12328 (Mar. 6, 1995)	12
61 Fed. Reg. 34002 (July 1, 1996)	42, 43

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E. Thomas Veal & Edward R. Mackiewicz, *Pension Plan Terminations* (2d ed. 1998)	9, 29, 41, 42
General Accounting Office Report No. 93-29, Private Pensions: Protections for Retirees' Insurance Annuities Can Be Strengthened (Mar. 1993)	12, 25
George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* (rev. 2d ed. 1983)	14, 15, 16
H.R. 2995, 99th Cong. § 105(b)(3)(E) (1st Sess. 1985)	30
H. Rep. No. 96-869(I) (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918	8
H. Rep. No. 99-300 (1985), *reprinted in* 1985 U.S.C.C.A.N. 756	27, 28, 30
H. Rep. No. 100-391(II), *reprinted in* 1987 U.S.C.C.A.N. 2313-378	17
Joint Implementation Guidelines on Asset Reversions, PBGC News Release 84-23 (May 24, 1984)	29, 40
PBGC Op. Letter 85-7 (Mar. 4, 1985)	30
PBGC Op. Letter 85-11 (May 14, 1985)	30
PBGC Op. Letter 85-25 (Oct. 11, 1985)	5, 30, 39, 40
PBGC Op. Letter 91-1 (Jan. 14, 1991)	25
PBGC Op. Letter 91-4 (May 3, 1991)	25
PBGC, Small Business Guide, Pub. 1008 (Oct. 1998), *available at* http://www.pbgc.gov/docs/small%20business%20guide.pdf	46
PBGC, Standard Termination Filing Instructions, *available at* http://www.pbgc.gov/docs/500_instructions.pdf	46
Uniform Probate Code § 1-201(13)	34
Uniform Probate Code § 3-703(a)	34

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STATUTES AND REGULATIONS

The text, in relevant part, of 29 U.S.C. §§ 1002 and 1341, and 29 C.F.R. § 4041.28 is set forth in the Appendix following this brief.

STATEMENT OF THE CASE

This matter arose during an insolvent employer's liquidation. Crown Vantage, Inc., maintained defined-benefit pension plans for its hourly employees represented by PACE International Union. Crown sold or closed all of its plants, so that its former employees had no prospects of future employment with Crown. Crown's Board of Directors then resolved to terminate the pension plans, and in order to facilitate the termination, merged twelve plans into one. During this process, a multiemployer defined-benefit pension plan known as PIUMPF offered to assume the benefit liabilities and assets of the merged pension plan.[1]

Initially, the Crown Board of Directors acknowledged that the PIUMPF offer "would be a favorable alternative," Joint Appendix ("J.A.") 94, and resolved on September 26, 2001, that the PIUMPF offer "will be evaluated in comparison to the annuitization of plans when we receive final bids from the annuity providers." J.A. 96. PIUMPF provided information to Crown for due diligence review. At a bankruptcy hearing on October 4, 2001, counsel for Crown assured the bankruptcy judge that the PIUMPF option was being considered and that before taking any action, Crown would present its proposed course of action to the court and give PACE an opportunity to comment. J.A. 87-89; Pet. App. 61. But five days later, when the Crown Board received annuity quotes that would leave approximately $5 million of surplus assets in the plans, it did an abrupt about-face. Giving no further con-

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[1] The multiemployer plan's full name is PACE Industry Union-Management Pension Fund.

sideration to the PIUMPF offer, and disregarding counsel's assurance to the court that Crown would present its proposed course of action for PACE's comment, the Crown Board spent more than $84 million of the plan's assets to purchase an annuity from the Hartford Life Insurance Company. Pet. App. 61.

PACE and two participants in the Crown hourly plan filed an adversary proceeding seeking to prevent the transfer of plan assets to Hartford. J.A. 9-29. They alleged that the failure to give serious consideration to the PIUMPF offer before deciding to purchase annuities was a breach of fiduciary duty under ERISA. Both parties presented evidence on this claim at a hearing November 29, 2001. On December 11, 2001, the bankruptcy judge found that the officers and directors of Crown "gave no serious consideration to the PIUMPF merger proposal." Pet. App. 62. The bankruptcy judge held that the decision to terminate the plan was a business decision, not subject to fiduciary duties, but that "discretionary actions taken to implement that decision" were subject to ERISA's fiduciary standards. *Id.* 65. "The decision whether to annuitize the plans or merge them into PIUMPF was such a discretionary act." *Id.* 66. Once the merger option was raised, "the Board had a fiduciary duty to fully explore it and determine which option was truly in the beneficiaries' best interests." *Id.* 65.

Turning to the question of relief, the judge noted that trying to unwind the annuity purchase could subject the plan to litigation with Hartford and a potential penalty of $4 million, and therefore entered an order that the assets left in the plan after the annuity purchase should be placed in an interest-bearing account pending final decision on the matter. *Id.* 66-67. The parties later stipulated that this preliminary order should be treated as a decision on the merits and further

stipulated that these assets would be distributed to plan participants if the order were affirmed on appeal. *Id.* 78-80.[2]

Crown appealed the order to the district court, which affirmed on January 10, 2003. *Id.* 29. It then appealed to the Court of Appeals, and the Court of Appeals affirmed on October 24, 2005. *Id.* 1. The only issue raised in the petition for certiorari is whether the Crown Board's failure to give serious consideration to PIUMPF's offer was a breach of fiduciary duty under ERISA.

SUMMARY OF ARGUMENT

Fiduciary duty. The two basic principles underlying the Court of Appeals' decision that the administrator of the terminating Crown plan was obligated to give serious consideration to the proposed merger of the Crown plan into PIUMPF, are beyond dispute: 1) An employer's decision to terminate a pension plan is not a fiduciary decision as defined by ERISA; and 2) when a plan administrator makes a decision on how to implement a plan termination, that decision must be carried out in accordance with ERISA's fiduciary duties, including the duty of loyalty, under which the administrator may act only in the interest of the plan's participants and beneficiaries.

Deciding on a method for disposition of a terminating plan's assets and for providing the plan's benefit liabilities, as the Court of Appeals held, is part of the process of implementing the termination. To the extent that the plan administrator is given authority under the plan document to make such a decision, the administrator exercises both "discretionary responsibility in the administration of such plan" and

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[2] The amount of surplus assets was later reduced by approximately $1.8 million when Hartford required another premium payment to cover some of the plan's benefit liabilities that had been overlooked in the initial bidding for the annuity. *See* Bankr. Dkt. 1641-46, 1656, 1664.

"authority or control respecting . . . disposition of its assets" and thus satisfies two distinct subparts of the ERISA definition of fiduciary. This conclusion is also in accord with the law of trusts, under which (as this Court has stated) distributing a trust's assets on termination was part of "the common law trustee's most defining concern historically . . . ." *Pegram v. Herdrich*, 530 U.S. 211, 231 (2000).

In the circumstances of this case, the Court of Appeals decision is fully consistent with cases cited by Petitioner and *amici* holding that plan mergers and transfers of liabilities and assets are outside ERISA's definition of fiduciary decisions because they change the design, structure, or composition of a plan. All of those cases involved transactions between ongoing plans, where employees would accrue future benefits under a different benefit scheme and where the employer's obligations to the ongoing plan would change. In this case, the liquidating employer was no longer in existence, and employees' benefits were fully accrued and protected. The design, composition and structure of the terminating pension plan, as the Court has used those terms, could not be changed by the proposed merger.

Merger as a Method of Implementing Plan Termination. 29 U.S.C. § 1341(b)(3)(A) expressly permits a plan administrator to decide between purchasing an annuity contract or "otherwise fully provid[ing] all benefit liabilities under the plan." That language, at the very least, authorizes a plan administrator to use a method of distributing assets and providing for benefit liabilities that is the legal equivalent of purchasing an annuity contract. A merger of a terminating single-employer plan into a multiemployer plan is such a legal equivalent. Although Petitioner and the government cite words and phrases out of context from § 1341 to argue that merger is not permitted under that section, their arguments founder on the fundamental fact that merger, in which the terminating plan's assets would be transferred to the

multiemployer plan in exchange for the multiemployer plan's assumption of all the benefit liabilities, would "distribute" the terminating plan's assets and "fully provide all benefit liabilities under the plan" in just the same way that Congress expected that annuities would satisfy those requirements.

The merger of a terminating plan into a multiemployer plan would also be consistent with applicable regulations. The PBGC's current regulation under § 1341, echoing the statute, authorizes the distribution of assets either through purchase of annuities or "in another permitted form." 29 C.F.R. § 4041.28(c)(1). The government concedes that this regulation would permit a distribution in some form other than annuities, lump sum cash distributions or rollovers, but cannot give even one example of what another permitted form would be, if not a transfer of assets and liabilities that is the legal equivalent of purchasing an annuity contract. Gov't Br. at 23. The government's assertion that mergers are not permitted is nothing more than a litigating position, offered without attempting to explain its inconsistency with PBGC's prior regulatory actions: 1) Opinion Letter 85-25, in which PBGC concluded that a transaction identical for all purposes to what PIUMPF proposed in this case could be accomplished by a transfer of assets and liabilities to a multiemployer plan followed by a reversion to the employer of excess assets in the single-employer plan, without purchasing annuities; and 2) the PBGC's 1997 revision of the regulation in question—in which the agency substituted the authorization for "another permitted form" in the place of a former requirement that annuities be purchased for almost all benefits that a plan would have provided in annuity form. Under *Gonzales v. Oregon*, 546 U.S. 243, 126 S. Ct. 904 (2006), and *United States v. Mead Corp.*, 533 U.S. 218 (2001), the government's current interpretation of its regulations is not entitled to deference and should not be followed.

ARGUMENT

The Court of Appeals ruled on the two questions posed by this case, as follows: First, that the selection of a method to implement an employer's decision to terminate a defined benefit pension plan is a fiduciary decision[3] and if a proposed merger of the terminating plan into a multiemployer plan is on the table as one of those methods, it must be faithfully investigated in the interest of the terminating plan's participants; and, second, that 29 U.S.C. § 1341(b)(3)(A) and the regulations issued thereunder, which govern standard pension plan terminations, allow a plan to effectuate such a termination through a merger of the plan into a multiemployer pension plan.

Each of those Court of Appeals rulings is correct and both should be affirmed by this Court, as we now show. In part one of the argument that follows, we set out the basic operational and transactional context from which this case arises. In part two we show that the Court of Appeals "fiduciary decision" ruling is correct. And in part three we show that the Court of Appeals ruling that the proposed merger was a lawful method to implement the termination is equally correct.

I. THE OPERATIONAL AND TRANSACTIONAL CONTEXT OF THIS CASE

The pension plans involved in this case are defined benefit plans. Such plans promise a fixed level of benefits to employees who qualify for such benefits under the terms of the plan. No participant has a claim to any assets of the plan, but only to the defined level of benefits that the plan

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[3] If the Court of Appeals' discussion of the issue seems cursory, it was in direct proportion to Petitioner's briefing, in which less than two pages of argument was devoted to the question. Br. for Appellant at 18-19, *Beck v. Pace Int'l Union, et al.*, case nos. 03-15303, 03-15331 (9th Cir. 2005).

promises. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440 (1999).

The Crown plans that were terminated here were single-employer pension plans. In such plans the employer may act in a dual capacity, as both settlor and plan administrator. *Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996). When performing settlor functions the employer is free to make decisions for the sole purpose of furthering its business interests, but when acting as plan administrator in a capacity that ERISA defines as fiduciary, the employer must comply with ERISA's fiduciary duties. *Pegram v. Herdrich*, 530 U.S. at 225. Those fiduciary duties include acting "solely in the interest of the participants and beneficiaries . . . ." 29 U.S.C. § 1104(a)(1).

PIUMPF is a multiemployer pension plan. Multiemployer plans, by definition, are maintained pursuant to collective bargaining agreements between a union and two or more unaffiliated employers. 29 U.S.C. § 1002(37). "Such plans, commonly known as 'Taft-Hartley' plans, . . . are the product of joint negotiation between employers and a union representing employees and are administered by trustees nominated in equal numbers by employers and the union." *Connolly v. PBGC*, 475 U.S. 211, 232 (1986). While employers typically contribute to multiemployer plans at a negotiated rate for each hour or day of work performed by covered employees, *see, e.g., Walsh v. Schlecht*, 429 U.S. 401, 404-06 (1977), because Crown was in liquidation, PIUMPF's proposal did not contemplate any obligation for Crown to make future contributions to the multiemployer plan. That proposal contemplated instead that PIUMPF would assume full liability for the benefits that Crown employees had earned under the Crown plans, in exchange for a one-time transfer of assets sufficient to fund those liabilities. Pl. Ex. 25 at 4 (Bankr. Ct. Hr'g Nov. 29, 2001), Bankr. Dkt. 22 at 56, 89. The benefits that Crown employees

had earned would not be reduced in connection with that transaction. *Id.* at 5. Nor would Crown employees accrue any additional benefits in the future under PIUMPF unless they worked for another contributing employer. If so, they would accrue benefits on the same terms that applied to other employees of that contributing employer. *Id.* at 4. That ability to accumulate benefits in one plan based on service with different employers—known as "portability"—is one of the advantages of multiemployer plans for participants. *See* Multiemployer Pension Plan Amendments Act of 1980, H. Rep. No. 96-869(I), at 53 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918, 2921.

Transactions between defined benefit pension plans like the one proposed here are common, most frequently in ongoing plans. For example, in connection with a corporate acquisition, the parties may transfer assets and liabilities from the selling company's pension plan to the acquiring company's plan, or merge two plans. *See, e.g., Flanigan v. General Elec. Co.*, 242 F.3d 78 (2d Cir. 2001); *Brillinger v. General Elec. Co.*, 130 F.3d 61 (2d Cir. 1997). A selling company may split its plan into two plans in order to facilitate such a transfer—a "spin-off." *See, e.g., Systems Council EM-3 v. AT&T Corp.*, 159 F.3d 1376 (D.C. Cir. 1998). Following such a spin-off, one of the new plans may be merged into the plan of the acquiring company—a "merger-spin-off." *See* 26 C.F.R. § 1.414(*l*)-1(o). Multiemployer plans likewise are commonly involved in mergers and transfers of assets and liabilities from and to other plans.

The principal limit that ERISA places on all of these transactions is that the benefits to which participants are entitled cannot be lower immediately after the transaction than they were immediately before the transaction. 29 U.S.C. § 1058(d) (applicable to single-employer plans); *id.* § 1411(b)(2) (applicable to transactions between multiemployer plans); *id.*

§ 1412(b) (applicable to transactions between single-employer and multiemployer plans).

Plan mergers and transfers of assets and liabilities also commonly occur in the context of plan terminations. For example, in this case, Crown merged twelve of its hourly employee pension plans to facilitate the termination that the employer was planning. Pet. App. 31-32. Other transactions occur as "spin-off terminations," where assets and liabilities are spun off to create a new plan and the remainder of the original plan is terminated. *See* 29 C.F.R. § 4041.23(c). Similarly, assets and liabilities may be transferred to an existing plan, leaving the original plan to be terminated. *See generally* E. Thomas Veal & Edward R. Mackiewicz, *Pension Plan Terminations* 164-74 (2d ed. 1998).

In this case, PIUMPF's proposal was described variously as a "merger," as a "transfer of assets and liabilities," or as PIUMPF "taking in" or "taking on" the Crown hourly plans.[4] In the context of termination of the single-employer plan, all of those terms mean the same thing. A transfer of benefit liabilities and assets from the Crown plan to PIUMPF is the same as a merger of a plan containing those liabilities and assets into PIUMPF. IRS regulations governing transactions between single-employer plans provide that any transfer of assets and liabilities from one plan to another is "considered as a combination of separate mergers and spinoffs . . . . Thus, for example, if . . . a block of assets and liabilities are transferred from Plan A to Plan B, each of which is a defined benefit plan, the transaction will be considered as a spinoff

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[4] Although most of the briefing in the courts below used the term "merger," the Respondent's brief to the Court of Appeals also characterized the proposed transaction as a transfer of assets and liabilities. Br. for Appellee at 20, 23, 28-29, 32, 33, *Beck v. Pace Int'l Union, et al.*, case nos. 03-15303, 03-15331 (9th Cir. 2005). The Petitioner's Reply Brief did not take issue with the accuracy of that characterization of the proposed transaction.

from Plan A and a merger of one of the spinoff plans with Plan B." 26 C.F.R. § 1.414(*l*)-1(o). The principle is the same when a multiemployer plan is involved. Accordingly, the use of the term "merger" did not preclude structuring the transactions as a transfer of assets and liabilities to PIUMPF followed by formal termination of the Crown plan. Nor, as discussed at 39-40, *infra,* would it have precluded a reversion of any surplus assets to Crown in connection with the termination.

Against this background, Petitioner has not argued, and does not argue, that its decision to implement the termination of the Crown plans by purchasing an annuity, without serious consideration of PIUMPF's proposal, was a decision that satisfied ERISA's fiduciary standards. Rather, Petitioner argues only that the decision was not subject to ERISA's fiduciary standards and that, if it was subject to fiduciary standards, the proposed merger was not a legally permissible means of implementing a plan termination. Accordingly, if the decision was subject to ERISA's fiduciary standards and if merger was a legally permissible means of implementing the termination, the decision of the Court of Appeals is entitled to affirmance.

II. DECISIONS ON THE METHOD OF IMPLEMENTING A PLAN TERMINATION ARE SUBJECT TO ERISA'S FIDUCIARY STANDARDS AS LONG AS THEY ARE WITHIN THE SCOPE OF AUTHORITY PROVIDED IN THE PLAN DOCUMENTS

A. The statutory definition of fiduciary makes the decision on disposition of plan assets on termination a fiduciary decision.

The definition of "fiduciary" is the starting point for deciding every question as to whether a decision affecting a plan is

subject to ERISA fiduciary standards. That definition, in 29 U.S.C. § 1002(21)(A), provides that

> a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

The decision on the method for implementing a plan termination is a fiduciary decision under two distinct subparts of this definition. One is subpart (iii)—"discretionary authority or discretionary responsibility in the administration of such plan." The other is subpart (i), which includes "any authority or control respecting . . . disposition of [the plan's] assets."

1. Implementation of a decision to terminate is plan administration.

This Court has issued several decisions interpreting the plan administration subpart of the definition. In those decisions, the Court has described a plan sponsor's decision that a plan should be terminated as a business decision analogous to decisions made by settlors under trust law, and not part of plan administration. *Hughes Aircraft Co.*, 525 U.S. at 443; *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *Varity Corp.*, 516 U.S. 489 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

Once a decision to terminate has been made, however, a variety of decisions are necessary to implement the termination. The most critical part of implementation is the decision on how to dispose of the plan's assets for the purpose of providing benefit liabilities. Most commonly this disposition of assets is accomplished by arranging with an insurer for the

purchase of a group annuity contract to substitute for the benefit obligations of the plan. The Department of Labor and the PBGC have long interpreted ERISA to provide that the selection of an insurer for this purpose is a fiduciary function and must be performed prudently and in the best interest of participants and beneficiaries. *See Waller v. Blue Cross of California*, 32 F.3d 1337, 1343 & n.12 (9th Cir. 1994).

No one in this case questions the validity of that interpretation. In the 1980s, contemporaneous with the DOL's adoption of its interpretation, the Executive Life Insurance Company and others were capturing a large share of the market for group annuities by quoting low annuity prices that gave large reversions to employers. Those insurers were able to quote low prices because their underwriters assumed that the insurers' risky investment portfolios would continue to yield high returns. General Accounting Office Report No. 93-29, Private Pensions: Protections for Retirees' Insurance Annuities Can Be Strengthened 12-13 (Mar. 1993). When this aggressive strategy failed, several insurance companies collapsed, and large numbers of participants whose pension plans had purchased the low-priced annuities lost a large part of their pension benefits. *Id.* at 10, 13. DOL adopted an interpretation of ERISA's fiduciary standards for the purpose of reducing the risk of such losses. Interpretive Bulletin, 60 Fed. Reg. 12328 (Mar. 6, 1995). It stated that implementation of a plan termination requires selection of an insurer based solely on the interests of participants in the security of their benefits, and not in the interest of obtaining the largest reversion for the employer. *Id.* at 12328-12329. *See also* 29 C.F.R. § 4041.28(c)(3) (PBGC regulation). The courts have similarly concluded that selection of an annuity to implement plan termination is a fiduciary decision under ERISA. *See, e.g., Waller*, 32 F.3d at 1342-44; *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 295-98 (5th Cir. 2000).

The government argues, however, that only a choice *among* annuity providers is a fiduciary decision under ERISA. Gov't Br. at 17. The government suggests that this decision is different from all the other decisions on how to implement a termination "because it involves a discretionary choice about how to expend plan assets" and because ERISA "assigns responsibility for the decision to the plan administrator." *Id.* That assertion refutes itself. First, the choice of a method to implement termination, within the scope of authority granted by the plan document, is equally a discretionary decision about how to expend plan assets. Second, it is not just the selection of a particular insurer that ERISA assigns to the plan administrator. Section 1341(b)(3)(A) expressly charges the "plan administrator" in a terminating plan with the broader responsibility to provide benefit liabilities to participants by either (i) purchasing an annuity, or (ii) otherwise fully providing for the liabilities. In *Varity v. Howe*, the Court found it highly significant, in concluding that communicating to plan participants about their benefits was fiduciary in nature, that Congress assigned to the plan administrator the task of distributing information about a plan, such as summary plan descriptions. 516 U.S. at 502. Similarly, by assigning to the plan administrator in § 1341 the task of making determinations as to the final disposition of a terminating plan's assets, Congress showed that it understood that task to be administrative, and hence, fiduciary in nature. [5]

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[5] The government urges the Court to draw significance from the fact that 29 U.S.C. § 1411, which governs mergers between multiemployer plans, assigns the functions under that section to the "plan sponsor." This, according to the government, suggests that Congress likewise considered a decision whether to merge a single-employer plan into a multiemployer plan to be a "plan sponsor" decision. Gov't Br. at 17. There are two reasons why this argument should be rejected. First, 29 U.S.C. § 1412—which specifically governs merger of a single-employer plan into a multi-employer plan—does not assign similar functions to a "plan sponsor." Second, mergers of ongoing plans, such as § 1411 encompasses, may nor-

2. Implementation of plan termination also requires disposition of the plan's assets.

This Court has regularly consulted the common law (including what were once the distinct rules of equity) to understand the background against which Congress defined fiduciary obligations under ERISA. *E.g., Pegram,* 530 U.S. at 224. Based on that common law, the Court has recognized that the decision on how to distribute a trust's assets, both routinely and upon termination, was a traditional responsibility of the fiduciary:

> At common law, fiduciary duties characteristically attach to decisions about managing assets and distributing property to beneficiaries. See Bogert & Bogert, Law of Trusts and Trustees §§ 551, 741-747, 751-775, 781-799; 2A Scott §§ 176, 181; 3 *id.*, §§ 188-193; 3A *id.* § 232. Trustees buy, sell, and lease investment property, lend and borrow, and do other things to conserve and nurture assets. They pay out income, choose beneficiaries, *and distribute remainders at termination.* Thus, the common law trustee's most defining concern historically has been the *payment of money in the interest of the beneficiary.*

Pegram, 530 U.S. at 231 (emphases supplied).

This "most defining concern," *id.*, of the common law trustee is reflected in the ERISA definition that includes as a fiduciary decision "control or authority respecting . . . the disposition of assets." 29 U.S.C. § 1002(31)(A)(i). When the settlor has decided that a plan is to be terminated, it falls to the plan administrator, acting in a fiduciary capacity, to decide on the disposition of plan assets. This decision is squarely within the duties of a trustee at common law upon termination of a trust:

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mally be plan sponsor decisions, *see infra* at 19-21, but the merger here, as a method of implementing plan termination, is governed by the specific plan termination provision of § 1341.

> At such time when the trust is terminated in any way, whether by the expiration of its fixed term or by revocation or court decree or otherwise, the trust nevertheless continues for a reasonable time during which the trustee has power to perform *such acts as are necessary to the winding up of the trust and the distribution of the trust property as are expressly given or reasonably implied from the trust instrument.* The trustee has the duty to carry out this phase of trust administration with reasonable care and prudence.

George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees*, § 1010, at 448-50 (rev. 2d ed. 1983) (emphasis supplied).

3. In both cases the scope of the fiduciary's authority depends on the terms of the plan.

Petitioner and *amici* here argue that grave and serious consequences will result from the Court of Appeals' ruling that the decision of how to implement a plan termination is a fiduciary decision. All of their concerns are unfounded, because an employer can limit the decisions a plan administrator can make by limiting the authority that the plan document grants to the administrator.

Neither the statute nor the common law gives a plan administrator or trustee the power to disregard the plan document when administering the plan or deciding how to dispose of plan assets. ERISA is very clear that a plan administrator must discharge his duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I] and [Title IV]." 29 U.S.C. § 1104(a)(1)(D). If the plan document contains limits on how a termination will be implemented, and if those limits are consistent with Titles I and IV of ERISA, a decision contrary to those limits is not within the plan administrator's discretion in the administration of the plan nor is it within his "control or authority" over the

disposition of plan assets. Similarly, as the passage from Bogert, *Law of Trusts and Trustees*, quoted at 15 *supra*, states, a trustee's powers in winding up the trust must be "expressly given or reasonably implied from the trust instrument."

In this case, the district court held that the plan document governing the Crown plan permitted merger into a multiemployer plan as a means of terminating the plan. Pet. App. 47. The Court of Appeals declined to review that holding because Petitioner had not raised it in the bankruptcy court and therefore waived it. Pet. App. 10. Petitioner does not seek review of that holding here, and for purposes of this Court's review, the plan document allowed the plan administrator to implement the sponsor's termination decision through a merger of the plan into PIUMPF.

If, instead, the plan sponsor had amended the plan to provide that plan termination had to be implemented through the purchase of an annuity contract, the plan administrator would have been bound to follow that plan provision unless it was inconsistent with Title I or Title IV of ERISA. And it is clear that there is no such provision that is even arguably inconsistent with a plan rule requiring the purchase of annuities on plan termination. As we discuss in detail in Part III of this brief, 29 U.S.C. § 1341 permits the plan administrator to use annuities or other means of distributing a plan's assets on termination, as long as those other means are "in accordance with the provisions of the plan." *Id.* § 1341(b)(3)(A)(ii). That section would permit a plan sponsor to adopt a plan provision that withdraws from the plan administrator any authority or control to dispose of the plan's assets by a means other than an annuity purchase. Thus, if a plan sponsor does not want to allow the liabilities and assets in the plan at the time of termination to be merged into a multiemployer plan, the plan sponsor can foreclose such an outcome by adopting a clear plan provision.

Similarly, if the plan sponsor wants to make certain that it can obtain a reversion of any excess assets (if assets remain after the plan administrator has provided for the benefit liabilities in accordance with fiduciary standards), the plan sponsor can adopt plan provisions that will require a reversion in those circumstances.[6] Reversions are not restricted to terminations in which the plan administrator purchases annuities. As we discuss in detail *infra*, 39-41, PBGC has recognized that reversions are possible when a terminated plan's benefit liabilities are transferred to another plan.[7]

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[6] We would note that the arguments of Petitioner and the government that any rule that could make reversions more difficult would be contrary to the policy of ERISA are unsound. Congress has not favored employer reversions but has merely permitted them under limited circumstances. *See, e.g.*, 26 U.S.C. § 4980 (imposing an excise tax of 20% or 50% on any reversion); H. Rep. No. 100-391(II) at 1002, *reprinted in* 1987 U.S.C.C.A.N. 2313-378, 2313-619 "[The [Ways and Means] Committee does not believe that it is appropriate to expand the situations in which an employer may obtain a reversion. To do so runs the risk that employers would use pension plans as a tax-deferred savings account rather than as a retirement system.")

[7] In this particular case, Petitioner and the government assert that because PIUMPF's proposal called for all of the Crown plan's assets to be transferred, Crown would have been deprived of a possible reversion if the proposal had been accepted. Pet'r Br. at 33-34; Gov't Br. at 20. If Crown had amended the plan to provide that the termination could be implemented only through a method that transferred no more assets than were required to fund the liabilities, the plan administrator could have proceeded with the merger only if PIUMPF were willing to accept assets equal to the value of the liabilities. Because the record shows that PIUMPF had previously offered to accept all of Crown's hourly employee plans—including five other plans that were underfunded—it is reasonable to assume that it would have been willing to accept the twelve better-funded plans on terms that would leave assets for a reversion to Crown. Tr. of Proceedings, Bankr. Ct. Dkt. 22 (Nov. 29, 2001), at 88:22-24; 100:23-101:2, 126:10-12. Any uncertainty on this point in the record is due entirely to Crown's abrupt action cutting off consideration of a PIUMPF merger instead of exploring it fully.

B. The proposal to implement the termination through merger was not exempt from ERISA's fiduciary standards because of any effect on plan design or structure.

Petitioner and the government argue that a decision to merge the Crown plan into PIUMPF cannot be an ERISA fiduciary decision because it would be a decision on changing "plan design" or "structure," and this Court's prior decisions have described decisions on changing plan design or structure as settlor decisions, Pet'r Br. at 16-17; Gov't Br. at 15. This argument misapprehends the Court's precedents, both as a matter of law and as that law applies to the undisputed facts of this case.

This Court has not purported to create a "settlor function" rule independent of ERISA's definition of fiduciary, but has simply identified functions that are not encompassed within that definition. In *Lockheed Corp. v. Spink*, 517 U.S. at 890, the Court summarized the decision in *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73 (1995), and said: "This rule is rooted in the text of ERISA's definition of fudiciary. . . . As the Second Circuit has observed, 'only when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management or administration,' does a person become a fiduciary . . . ." 517 U.S. at 890 (quoting *Siskind v. Sperry Ret. Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995)). If a function is encompassed by the ERISA definition, the person performing it must comply with the fiduciary standards; if the function is outside that definition, the standards do not apply.

Here, the authority to select a method for implementing termination by disposition of plan assets is squarely within the ERISA definition of fiduciary. The arguments made by Petitioner and the government would require the Court to carve out an exception from that definition whenever the exercise of that authority could also be described as having an

effect on plan composition, design or structure. The definition supports no such exception.

In any case, even if certain plan mergers proposed as a method of implementing a termination could be taken outside the fiduciary definition because of some effect on plan composition, design or structure, the proposed merger in this case cannot be such an exception.

In *Hughes Aircraft v. Jacobson* the Court elaborated on the meaning of a change in the composition, design, form or structure of a plan:

> In general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets. . . . ERISA's fiduciary duty requirement simply is not implicated where Hughes, acting as the Plan's settlor, makes a decision regarding the form or structure of the plan *such as who is entitled to receive plan benefits and in what amounts, or how such benefits are calculated.*

525 U.S. at 444 (emphasis supplied). The critical point here is that the proposed transaction with PIUMPF would *not* have changed the Crown plan of benefits in any respect. ERISA is explicit that no person's benefit can be reduced as part of a merger or transfer of assets and liabilities between a single-employer plan and a multiemployer plan. 29 U.S.C. § 1412(b). Nor would the Crown plan of benefits be increased as a result of the merger. All Crown benefits were fixed (and fully earned) based upon the employees' past work for Crown, and there was no possibility of work for Crown in the future. If any participant in the Crown plan earned future benefits under PIUMPF, it would be solely for service with another employer making contributions to PIUMPF, and not due to that participant's status as a former Crown participant. Whether the assets were transferred to PIUMPF or used to

purchase an annuity, Crown was no longer in existence and was no longer the plan sponsor, and the composition, design and structure of the Crown plan benefits would not change.

In this respect, a plan merger in conjunction with termination is fundamentally different from a proposal to merge ongoing plans. If employees would continue to accrue benefits under a merged plan, that merger could affect the plan's structure. For example, if Crown were still operating its plants when PIUMPF proposed merger, and if the proposal contemplated that Crown would become a contributing employer to PIUMPF, employees would begin to accrue benefits under PIUMPF's benefit rules for their future Crown service, and Crown would be subject to PIUMPF's rules regarding contributions, reporting, and the other responsibilities of an employer with an ongoing agreement to be one of the employers maintaining that plan.

This same fact also distinguishes each of the cases that Petitioner and the government cite for the proposition that a plan merger or transfer of assets and liabilities is a change in plan structure that falls within the realm of plan sponsor prerogatives. Petitioner and the government cite *Malia v. General Elec. Co.*, 23 F.3d 828 (3d Cir. 1994), and *Sutter v. BASF Corp.*, 964 F.2d 556 (6th Cir. 1992). Both cases involved ongoing plans in which the plan sponsor continued to have obligations to the plan and the participants continued to accrue benefits under the new plan after the merger. (It should also be noted that *Sutter* has absolutely nothing to do with ERISA fiduciary duties, as the plan merger in question occurred in 1961, long before ERISA was enacted. 964 F.2d at 562.) The government also cites *Flanigan v. General Electric Co.*, 242 F.3d 78 (2d Cir. 2001); *King v. National Human Res. Comm., Inc.*, 218 F.3d 719 (7th Cir. 2000); and *Systems Council EM-3 v. AT&T Corp.*, 159 F.3d 1376 (D.C. Cir. 1998). All of those cases similarly involved transfers of assets and liabilities and spin-offs affecting ongoing plans and

participants who continued earning benefits under the new plans. Unlike the proposed PIUMPF transaction, all of those plan changes could affect the structure of the plans, as this Court has used that term.

Moreover, the Court of Appeals decision in this case does not offend any of Petitioner's policy arguments that a sponsor must be free to control decisions about plan merger for the purpose of furthering its business interests. As we already discussed, if a plan sponsor wants to reserve to itself, acting as a settlor, the decision whether to merge plans in connection with a termination, it can adopt a plan provision that withholds from the plan administrator any authority to merge the plan with another. The settlor thus will retain full control over any merger proposal in its capacity as plan sponsor. On the other hand, if the plan allows the plan administrator to exercise that authority as a means of implementing termination, then a decision on a proposal for merger must be made in accordance with ERISA's fiduciary standards.

As a final point in this regard, Petitioner argues that the Court of Appeals adopted a "temporal test" under which the fiduciary character of the decision concerning plan merger depended entirely on whether it was made before or after the plan sponsor's decision to terminate the plan. Pet'r Br. at 18-19. But the Court of Appeals' decision does not depend on the timing of the decision on merger, rather on its context. The decision whether to merge the Crown plan assets and liabilities into PIUMPF was fiduciary because it was made by the plan administrator to implement termination of the plan by deciding how to make final disposition of plan assets. That is a fiduciary decision under ERISA, if within the authority of the plan administrator, whether it is made before the employer formally resolves to terminate the plan or after.

For these reasons, the Court of Appeals correctly held that the decision whether to implement termination of the Crown plan by using the plan's assets to purchase an annuity or by

merging the plan into PIUMPF was a fiduciary decision under ERISA and had to be made in the interests of plan participants and beneficiaries. Petitioner does not challenge the bankruptcy court's factual finding that the Crown Board failed to give serious consideration to the PIUMPF proposal. Nor does Petitioner argue that it somehow complied with ERISA fiduciary duties in spite of that failure. The only remaining argument that Petitioner has is that the law would not have permitted merger into PIUMPF as a means of implementing the termination of the Crown plan. We turn now to that argument.

III. MERGER INTO PIUMPF WOULD HAVE BEEN CONSISTENT WITH THE STATUTE AND APPLICABLE REGULATIONS.

A. 29 U.S.C. § 1341(b)(3)(A) allows for merger into another plan as a method of distributing a terminating plan's assets and providing for its benefit liabilities.

The Court of Appeals correctly held that under 29 U.S.C. § 1341(b)(3)(A), which governs standard termination of single-employer plans, merger of a terminating plan into a multiemployer plan is a legally proper method of distributing the assets of, and providing the benefit liabilities of, the terminating plan.

Section 1341(b)(3)(A) states:

> (3) **Methods of final distribution of assets.**
>
> (A) In general. In connection with any final distribution of assets pursuant to the standard termination of the plan under this subsection, the plan administrator shall distribute the assets in accordance with section 1344 of this title. In distributing such assets, the plan administrator shall—

> (i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, *or*
>
> (ii) *in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan.* A transfer of assets to the corporation in accordance with section 1350 of this title on behalf of a missing participant shall satisfy this subparagraph with respect to such participant.

29 U.S.C. § 1341(b)(3)(A) (emphasis supplied).

The explicit terms of § 1341 permit the plan administrator to distribute the plan assets either through the purchase of an irrevocable commitment from an insurer (*i.e.*, an annuity contract) or by some other method that will "otherwise fully provide all benefit liabilities under the plan." If the plan administrator chooses a method other than an annuity, that method must be "in accordance with the provisions of the plan and any applicable regulations."

Two points are plain from the text. The first point is that Congress intended the purchase of an annuity contract to be one of a number of legally proper methods of "fully provid[ing] all benefit liabilities" to plan participants. There is no other way to understand the use of the word "otherwise" to link the annuity option in subsection (i) to the "fully provide all benefit liabilities" option in subsection (ii). The second point is that, at the least, subsection (ii) authorizes methods of distributing the plan assets that are the legal equivalent of purchasing an annuity contract in "fully provid[ing] all benefit liabilities under the plan."

Because Congress plainly intended the purchase of annuity contracts to be a method to "fully provide all benefit liabilities," and because Congress expressly permitted methods that "otherwise" accomplish that objective, it follows that if a particular type of transaction accomplishes the objective in a manner legally equivalent to an annuity contract, then

that type of transaction must be among those that satisfy § 1341(b)(3)(A)(ii)'s "otherwise fully provide all benefit liabilities" criterion. *See Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler,* 537 U.S. 371, 372, 385 (2003) (invoking the canon that words are known by their companions (the doctrine of *noscitur a sociis*) to hold that the term "'other legal process' should be understood to be process much like the processes [specified in the statute] of execution, levy, attachment, and garnishment.")

A third point critical to the proper interpretation of § 1341(b)(3)(A) insofar as it applies to this case is clear from the nature of purchasing an annuity contract and the nature of merging a terminating pension plan into another pension plan. That point is that the annuity purchase and the merger *are* legally equivalent methods of distributing the terminating plan's assets so as to "fully provide all benefit liabilities."

Insurers providing annuity contracts for the benefit of former ERISA plan participants only make unsecured *promises* to the participants. Those promises can be financed from the insurer's general assets. *See* 29 C.F.R. § 2510.3-3(d)(2). Insurers are not required to—and do not in practice—segregate the premium payment they receive from a terminating ERISA plan and place that payment in a separate trust for the participants, nor do they provide the participants with a specific piece of property or a claim to a divisible share of insurance company assets. *See generally* 56 Fed. Reg. 28638 (June 21, 1991) (Notice of Proposed Rulemaking by Department of Labor on "Annuitization of Participants and Beneficiaries Covered under Employee Pension Plans") ("DOL Annuitization Proceedings"). Rather, the insurer provides the annuitant with a certificate evidencing his or her contract rights *vis a vis* the insurer. The only legal right that an annuitant under such a contract possesses is the right to sue the insurer under state law for a breach of contract in the event of a default.

For that reason, as the Department of Labor and PBGC have recognized, participants who receive annuity rights due to plan termination are subject to the risk that the insurer will—due to poor investment choices by its financial managers, unexpected claims volume generated by its other insureds, or other contingencies—default on its promises and that the participants will not ultimately receive all the benefits they had been promised under the terminated plan. *See* DOL Annuitization Proceedings, 56 Fed. Reg. 28638, 28640 (citing then-recent insurance company failures; stating that "concerns have been expressed about the ability of certain insurance carriers to satisfy their annuity liabilities because their investment portfolios contain . . . 'junk bonds' . . . or troubled real-estate loans, or a combination of both"; and noting that state-law insurance guaranty programs vary widely and that most do not protect annuity interests over a certain amount, "usually $100,000"); General Accounting Office Report No. 93-29, Private Pensions: Protections for Retirees' Insurance Annuities Can Be Strengthened 17 (Mar. 1993) (detailing limitations of state guaranty programs and concluding that "the percentage of retirees whose benefits would not be fully covered by state guaranties are likely to rise over time"); 29 C.F.R. § 4041.27(b) (requiring notice about state guaranty programs be given to participants in a terminating plan whose benefits will be provided under an annuity contract).

Furthermore, PBGC opinion letters provide that when the administrator of a terminating plan purchases from an insurer an annuity contract that, on its face, promises to pay the benefits of the terminating plan, the terminating plan's benefit liabilities to participants under the plan are considered fully satisfied upon consummation of that purchase, and the terminating plan does not retain any residual or secondary liability to the former plan participants. PBGC Op. Letter 91-4 (May 3, 1991); PBGC Op. Letter 91-1 (Jan. 14, 1991). *See also* 29 C.F.R. § 4001.2 (distribution date when an annuity is purchased is the date on which the obligation to provide

benefits passes to the insurer). The PBGC thus treats a termination annuity purchase as the equivalent of a common-law contract novation, where a new obligor substitutes for the original obligor and the original obligor's liabilities are fully satisfied. *See* 30 Williston on Contracts § 76:1 (4th ed.) (the effect of a novation is that a "third party will be substituted for the obligor, as a result of which the obligor is released from liability and the third party takes its place"). The courts have embraced the PBGC's view on that issue. *E.g.*, *Waller*, 32 F.3d at 1345.

The merger proposed by PIUMPF, in which the transferee plan would assume the terminating plan's benefit obligations in exchange for a transfer of sufficient assets to finance those liabilities, has the same characteristics as an annuity purchase. It would provide for the same benefit promises made by the terminating plan by substituting a different promisor (the insurer in one case, the plan in the other). It would give the former participant the right to enforce that promise through a lawsuit (for breach of the annuity contract in one case, and for benefits due under the transferee plan in the other, *see Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) (characterizing a claim for benefits due under a benefit plan as an ERISA "contract" claim)). In both transactions the former participant receives a written document embodying the new benefit promise (an annuity certificate in one case, *see* 29 C.F.R. § 2510.3-3(d); and a description of the plan rules in the other, *see* 29 U.S.C. § 1022)).

There is, in short, nothing about a plan merger that makes it any less (or more) a vehicle for "fully providing all benefit liabilities" than a termination annuity contract. A plan merger is, moreover, a better method, compared to an annuity contract, to accomplish one of the fundamental purposes of Title IV of ERISA, as declared by Congress: "to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants," 29 U.S.C.

§ 1302 (a)(1).[8] This is not to deny that in certain cases, as the government suggests, the assumption of liabilities by another plan would entail a greater risk, compared to an annuity contract, that participants will not actually receive their benefits. Gov't Br. at 28-29. But, as the Executive Life experience demonstrates, the opposite may also be true. And, of course, in any particular case, the plan administrator's fiduciary duty to choose the safest method for providing future benefits, after appropriate investigation, would require the administrator to reject the riskier alternative. *See* 29 C.F.R. § 2509.95-1(c).

B. The legislative history of § 1341(b)(3)(A)(ii) confirms that Congress intended to permit flexibility in distributing assets upon plan termination, as long as the distribution fully provides all benefits.

Section 1341(b)(3)(A)(ii) originated in the Single Employer Pension Plan Amendments Act of 1986 (Title XI of the Consolidated Omnibus Budget Reconciliation Act of 1985), Pub. L. No. 99-272, 100 Stat. 82 (1986) ("SEPPAA"). SEPPAA had two main purposes: to increase the premiums that defined benefit plans pay to PBGC, and to impose structural reforms on the termination process to "close loopholes in existing law that permit profitable companies to avoid responsibility for the payment of certain benefits that are not guaranteed by the PBGC." *See* H. Rep. No. 99-300, at 279 (1985), *reprinted in* 1985 U.S.C.C.A.N. 756, 930. Prior to SEPPAA, an employer terminating a plan "generally

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[8] One other potential advantage of providing benefits through another plan after termination is that every ERISA plan must have a procedure for participants to present claims that their benefits are less than the plan document provided. 29 U.S.C. § 1133. If an annuity contract is premised on a mistaken calculation of a participant's benefit, the participant may have no recourse against the insurer for benefits that the annuity contract does not include.

ha[d] no obligation to pay for any benefits beyond those guaranteed by the PBGC." *Id.* at 290, U.S.C.C.A.N. at 941. Congress recognized that as a result, participants sometimes "lost substantial portions of the pension benefits to which they were entitled under the terms of their pension plan upon the termination of the plan, because these benefits were not guaranteed by the PBGC." *Id.*

To understand Congress's intent in drafting the rules governing the permissible methods of final distribution of plan assets, it is important to understand the regulatory structure in place prior to SEPPAA. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of the regulatory background against which it legislates). The PBGC had consistently expressed a strong preference for provision of benefits in annuity form—meaning periodic payments over a stream of time—rather than any form of lump sum distribution. The original PBGC regulations provided that "when a plan is closed out . . ., any benefit that is payable as an annuity under the provisions of the plan must be provided in annuity form either through the purchase from an insurer of a contract to provide the annuity or by the PBGC . . . ." 29 C.F.R. § 2615.4 (1981), 46 Fed. Reg. 9532, 9539 (Jan. 28, 1981). The regulation provided exceptions to this annuity requirement only where the benefit was *de minimis* or the plan provided for an alternative form of distribution and the participant elected that alternative form in writing. *Id.* Indeed, in adopting the 1981 regulations, the PBGC rejected a suggestion that plan administrators should have the discretion to provide benefits in a lump sum form upon plan termination without the participant's consent. In the preamble, PBGC explained: "A pension is a retirement annuity. It would be inconsistent with the Act for the PBGC to grant a plan administrator the discretion to deprive a participant entitled to a retirement annuity of that annuity." 46 Fed. Reg. at 9534.

In the early 1980s, a problem arose with certain employers abusing the termination process as a way to bleed surplus assets out of an on-going plan. *See generally* Veal & Mackiewicz, *supra,* at 165-68. Under long-standing tax law, an employer could not take a reversion from an on-going plan, as such would be an impermissible diversion of assets for a purpose other than the exclusive benefit of the plan beneficiaries. 26 U.S.C. § 401(a)(2). However, ERISA (as well as pre-existing tax and trust law) allowed employers to take a reversion of assets upon termination, if all benefit liabilities had been satisfied. 29 U.S.C. § 1341(d)(1). To take advantage of this, some employers engaged in what was referred to as a "spin-off/termination" transaction, in which they spun off plan liabilities, along with sufficient assets to cover those liabilities, into a new plan, leaving surplus assets in the original plan, then terminated the original plan in order to obtain the reversion.

In 1984, the Department of Labor, Internal Revenue Service and the PBGC issued Joint Implementation Guidelines to prevent these sham terminations. The Guidelines provided that in spin-off/terminations, "no termination will be recognized and any attempt to recover surplus assets will be treated as a diversion of assets for a purpose other than the exclusive benefit of employees and beneficiaries" unless the participants' accrued benefits were fully vested and "[a]ll benefits accrued as of the date of termination in the ongoing plan [were] provided for by the purchase of annuity contracts which represent irrevocable commitments for the benefit of each individual participant." Joint Implementation Guidelines on Asset Reversions ¶ 4, PBGC News Release 84-23 (May 24, 1984). *See generally* Veal & Mackiewicz, *supra*, at 173-74.

Following the issuance of these Joint Guidelines, the PBGC formally responded to several questions regarding their application to proposed transactions. The PBGC's responses consistently indicated that merging or transferring plan assets

into another plan was a permissible alternative to the purchase of annuity contracts from an insurer, as long as the transaction did not constitute a sham termination effected solely to obtain the reversion. *See* PBGC Op. Letter 85-7 (Mar. 4, 1985) (Guidelines do not apply to spin-off/termination where employer does not seek to take reversion; therefore plan administrator was not required to purchase annuities); PBGC Op. Letter 85-11 (May 14, 1985) (employer not required to purchase annuities for hourly employees spun off into new plan, where employer intended to terminate original plan covering remaining salaried employees and take reversion); PBGC Op. Letter 85-25 (Oct. 11, 1985) (Guidelines do not apply to proposed transfer of all liabilities of single-employer plan to a multiemployer plan, followed by termination of single-employer plan and reversion of surplus assets to the employer).

As the 99th Congress turned its attention to ERISA reform, the initial Administration proposal introduced in the House of Representatives reflected the PBGC preference for benefits paid in annuity form, requiring that "the plan administrator shall distribute plan assets in accordance with section 1344 by—"

> (i) purchasing irrevocable commitments to provide when due all benefits described in subparagraph (A) to all participants and beneficiaries, or
>
> (ii) otherwise fully satisfying *the obligation to provide when due* all such benefits in accordance with the provisions of the plan and any applicable regulations of the corporation.

H.R. 2995, 99th Cong. § 105(b)(3)(E) (1st Sess. 1985) (emphasis supplied); *see* H. Rep. No. 99-300, at 286 (1985), *reprinted in* 1985 U.S.C.A.A.N. 756, 937 ("The Administration legislation was introduced . . . as H.R. 2995 on July 15, 1985"). The language proposed by the Administration for subsection (ii) required that any alternative distribution "pro-

vide when due" the benefits—*i.e.*, over the time periods when they would have been paid under the terminating plan—and not in the form of a lump-sum equivalent. The Administration clearly contemplated a form of distribution, other than purchase of annuity contracts from an insurer, that would provide a stream of benefits over time—much as another defined benefit plan would do.

Although Congress ultimately enacted the basic structure of the Administration's proposal for distribution of plan assets, significantly, Congress enacted a less restrictive rule for distribution by methods other than annuity contracts. The rule enacted by Congress allowed plan administrators to choose any alternative method of distribution permitted by the plan, as long as that method "fully provide[d]" the benefits due to beneficiaries and as long as regulations did not forbid that method.

Two points are compelled by this background. First, neither the Administration that proposed the bill that became § 1341(b)(3)(A) nor the Congress that enacted this section intended to limit the subsection (ii) option to lump sum distributions or other immediate disbursements to plan beneficiaries. Second, the fact that Congress phrased subsection (ii) broadly suggests that the subsection (ii) option includes all methods of distributing assets that are the legal equivalent of the purchase of an annuity contract in "fully provid[ing] all benefit liabilities under the plan"—including the kinds of distributions PBGC had previously allowed in the form of transferring assets and liabilities to another plan.

C. Neither the words singled out by Petitioner and the government in § 1341(b)(3) nor the structure of ERISA preclude the Court of Appeals' interpretation.

Between them, Petitioner and the government make essentially three arguments from statutory language for reading

§ 1341(b)(3) to preclude the merger of a terminating plan into a multiemployer plan, and one argument based on statutory structure to the same end. None of these arguments bears inspection.

1. Petitioner argues that the clause "or otherwise fully provide" can be interpreted only to authorize lump-sum cash payments (with transfer to PBGC, on behalf of a participant or beneficiary the plan cannot locate, serving in the place of a direct payment, as specified in § 1341(b)(3)(A)(ii)). Pet'r Br. at 21. That argument is not a reasonable interpretation of § 1341. It would have been a simple matter for Congress to specify in § 1341(b)(3) that the plan administrator shall either purchase an annuity or make lump-sum cash distributions to participants, if that is what it intended.[9] The use of the term "otherwise fully provide" connotes a broader range of alternatives than just lump-sum cash distributions. An interpretation of subsection (b)(3)(A)(ii) to allow only lump-sum distributions would, moreover, be inconsistent with the legislative history of that subsection, discussed *supra* at 27-31.

2. In a variation on the same theme, Petitioner and the government contend that transfer of assets to another plan cannot satisfy the plan administrator's duty under § 1341(b)(3)(A) to "distribute the assets." Relying on dictionary definitions of "distribute" and simple assertion, they contend first, that a distribution necessarily entails dividing assets among multiple recipients and delivering the appropriate share to each participant, and second, that transfer to another plan does not accomplish such an individual delivery because it permits the assets to be commingled with assets

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[9] Congress used the term "lump sum distribution" in other parts of ERISA. For example, in Title II of ERISA (the portion of ERISA that appears in the Internal Revenue Code) the term "lump sum distribution" in the context of a pension plan is defined. 26 U.S.C. § 402(e)(4). This provision was in the Code when Congress added "otherwise fully provide" to § 1341(b)(3)(A).

that can be used for other participants. Pet'r Br. at 22-24; Gov't Br. at 18-19.[10] Petitioner adds that because the administrator must certify under § 1341(b)(3)(B) that it has distributed the assets "so as to pay all benefit liabilities," there must be a contemporaneous disbursement of assets to individual participants. Pet'r Br. at 22-23. And, the government further suggests that this requirement is not satisfied if the participants must await the payment of benefits by the merged plan as those benefits come due. Gov't Br. at 20.

The statute precludes these arguments. Because an annuity contract is the one method of final distribution of a terminating plan's assets that is specifically authorized by § 1341(b)(3), the statute itself defines what Congress meant by the word "distribution" and the phrase "pay all benefit liabilities." If, as Congress plainly intended, a plan administrator who writes a check to an insurer to purchase an annuity contract accomplishes a "distribution" and "pay[s] all benefit liabilities," then the administrator who writes a check to a multiemployer plan in exchange for its assumption of all benefit liabilities equally satisfies those two requirements. In each case participants receive no immediate payment or dedicated share of plan assets, but a contract right to receive future payments as they come due.

It is also to the point that the way Congress used the word "distribute" in § 1341 echoes the usage of that term in the common law of trusts and estates. *See Varity Corp.*, 516 U.S. at 502 (in interpreting ERISA, it is appropriate to look to "the common law, which, over the years, has given to terms such

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[10] Both Petitioner and the government cite 26 C.F.R. § 1.414(*l*)-1(b)(1), (2) for the proposition that plan assets in a merged plan *cannot* be segregated for the provision of benefits to participants in the merging plan. Pet'r Br. at 24; Gov't Br. at 19. This reliance is mistaken, because the regulations they cite apply only to single-employer plans; they do not apply when a multiemployer plan is involved "except to the extent provided by regulations of [PBGC]." 26 C.F.R. § 1.414(*l*)-1(c)(2). There are no such regulations.

as 'fiduciary' and trust 'administration' a legal meaning to which, we normally presume, Congress meant to refer"). In the law of trusts and estates, the word "distribution" is used to describe the final transfer of assets out of a trust or estate, whether there is one beneficiary or many.[11] It is also frequently the case that such a distribution is made to another trust, and not directly to a beneficiary, contrary to the assertions of Petitioner and the government. Pet'r Br. at 21, Gov't Br. at 18-19. Such a transfer is common practice in distributing assets from an estate.[12]

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[11] *See, e.g.*, Uniform Trust Code §§ 816(26), 817(b) (using "distribute" to describe the authority and the duty of a trustee to make a final disposition of the trust property following termination); Uniform Probate Code § 3-703(a) ("A personal representative is under a duty to settle and *distribute* the estate of the decedent in accordance with the terms of any probated and effective will and this Code, and as expeditiously and efficiently as is consistent with the best interests of the estate.") *See also Leith v. Mercantile Trust Co. Nat'l Ass'n,* 423 S.W.2d 75, 78, 85 (Mo. Ct. App. 1967) (fiduciary's duties in winding up a trust with a sole beneficiary included "distribution" of the trust property; beneficiary is described as "the sole distributee of a trust estate"); *Estate of Somers,* 89 P.3d 898 (Kan. 2004) (trust provided that after death of life beneficiaries, all remaining assets would be "distributed" to a single remainder beneficiary); *American Cancer Soc'y v. Hammerstein,* 631 S.W.2d 858, 864-65 (Mo. Ct. App. 1981) (litigation over trustee's decision to terminate trust and "distribute" all of its assets to the sole life beneficiary).

[12] The Uniform Trust Code acknowledges that trustees have authority to distribute assets to another trust in appropriate circumstances, even if the trust instrument does not provide for such a distribution. Uniform Trust Code § 816(21)(B). Scott on Trusts recognizes that a provision for distribution to another trust may affect the form in which property is distributed. IV Scott on Trusts § 347.7, at 579-80 (4th ed. 1989). The Uniform Probate Code § 1-201(13) defines "distributee" to include both "a testamentary trustee" and "a beneficiary of a testamentary trust." *See also, e.g., In re Klosinski,* 746 N.Y.S.2d 350 (Sur. Ct. 2002) (pour-over trust was the sole beneficiary designated in the will; the transfer of the estate's assets to the trust is described as a distribution of the estate); *Pastan v. Pastan,* 390 N.E.2d 253 (Mass. 1979) (executor's transfer of estate assets to a marital share trust was a distribution).

3. Petitioner and the government argue that because § 1341(b)(3) requires a distribution "in accordance with § 1344," only an actual "allocat[ion]" of assets to participants following the priority categories listed in § 1344 will satisfy the distribution requirement. Pet'r Br. at 22-24; Gov't Br. at 19. That contention fails, because a standard termination cannot be carried out unless the terminating plan is fully funded, meaning that there are sufficient funds available in the terminating plan to satisfy all six categories of § 1344(a). *See* 29 U.S.C. § 1341(b)(1)(D). No "allocation" among the six categories therefore takes place in a standard termination. If the plan administrator purchases an annuity contract from an insurer, that annuity satisfies the conditions of § 1344(a) in precisely the same way that a termination carried out through a plan merger would. Because the insurer (or the plan) is promising to meet all benefit liabilities, including those represented in all six categories of § 1344(a), no allocation among the six categories is required.[13]

4. Finally, Petitioner and the government argue that the structure of ERISA evidences an intention to treat plan mergers

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[13] IRS regulations are consistent with this understanding of § 1344. In mergers of single-employer plans, Internal Revenue Code § 414(*l*) requires parity of benefits before and after the merger "on a termination basis," meaning that benefit liabilities must be allocated to the priority categories in § 1344. 26 C.F.R. § 1.414(*l*)-1(b)(5). (The parallel provision in Title I of ERISA is 29 U.S.C. § 1058.) Under those regulations, if the plans' total assets are sufficient to cover all benefit liabilities, § 1344 is "satisfied merely by combining the assets and preserving each participant's accrued benefits." 26 C.F.R. § 1.414(*l*)-1(e)(1). If any participant would receive a smaller benefit on a termination basis from the merged plan, § 1344 is satisfied simply by inserting a special schedule of benefits that would implement the § 1344 allocation in the event the merged plan terminates or merges with yet another plan within the following five years. 26 C.F.R. § 1.414(*l*)-1(e)(2), (f)-(j). Similar provisions are made for spin-offs of defined benefit plans. *Id.* (n). Under these regulations, no actual distribution or dedication of assets is required to comply with § 1344.

and terminations as separate and distinct processes. Pet'r Br. at 28-35; Gov't Br. at 23-25. The differences between the two processes, however, do not mean that a merger cannot be a means of implementing a plan termination. Many plan mergers take place without intent to terminate a plan; in those cases, the requirements for plan merger can be followed without consulting the requirements for plan termination. Conversely, many plan terminations take place without an associated merger; in those cases there is no need to consult the requirements for mergers. But if a plan sponsor intends to use merger as a method of implementing a plan termination, it simply must follow the rules for both merger and termination.

Those rules are not "mutually exclusive," as Petitioner asserts. Pet'r Br. at 33. As noted above, page __, the principal requirement for all mergers (single-employer, multiemployer, or a combination of the two) is that accrued plan benefits be preserved in the transaction. The rule that applies when two single-employer plans merge requires that the value of those benefits be calculated "on a termination basis," but that means only, as we have seen, pages __, that they be calculated in both plans by reference to the § 1344 priorities.[14]

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[14] Petitioner argues that requiring calculation of benefit values in a single-employer plan merger "as if the plan then terminated" would be meaningless if merger could be used as a means of termination. Pet'r Br. at 32. There are two simple answers to this argument. First, this provision would continue to be necessary in those single-employer plan mergers that are accomplished with no intent to terminate a plan. Second, this "as if" provision is simply a shorthand method of referring to a common basis of calculating the extent of funding for benefit liabilities in both plans, as specified in 29 U.S.C. § 1344.

The Petitioner also relies on the § 4041.23(b)(9) notice provision, arguing that this provision is "mutually exclusive" with 29 C.F.R. § 2525.104-4, which the Petitioner describes as requiring "notice after the merger." Pet'r. Br. at 33. While there is no regulation at 29 C.F.R. § 2525.104-4, one may presume the Petitioner is referring to 29 C.F.R. § 2520.104-4. Section 2520.104-4 is part of the Department of Labor's general rules governing provision of summary plan descriptions, and simply sets forth

PBGC approval is not needed to effect an ordinary merger, but if a merger is being used to terminate a plan and results in a reversion of assets to an employer, the plan administrator will be required to comply with the requirements for termination. Moreover, the statute gives PBGC authority to prescribe by regulation "such additional requirements with respect to the transfer of assets or liabilities [between single-employer and multiemployer plans] as may be necessary to protect the interests of plan participants and beneficiaries and the corporation." 29 U.S.C. § 1412(f). If PBGC concludes that additional restrictions on such mergers are required to avoid an end-run around the termination requirements, or to avoid adverse consequences for the PBGC guaranty program, it has the regulatory authority to adopt them.[15]

"an alternative method of compliance" with these general rules for "certain successor pension plans in which some participants and beneficiaries not only have their rights set out in the plan, but also retain eligibility for certain benefits under the terms of a former plan which has been merged into the successor" where "plan mergers . . . occur after the issuance by the successor plan of the initial summary plan description under the Act." That provision is entirely compatible with provisions for prior notice of a plan termination. The plan administrator of the terminating plan would send the termination notice before termination, and the plan administrator of the new plan would send a summary plan description detailing benefits after the merger is complete.

[15] Petitioner makes a separate argument that § 1341 requires a method of distribution that takes the plan's assets and liabilities "outside of the ERISA-regulated pension plan system." Pet'r Br. at 25 n.9, 27. This argument finds no support in the statute or regulations, and is based on nothing more than the fact that the two distribution methods Petitioner acknowledges—annuity purchase and lump-sum payments—have this result. Nowhere does the statute specify that this is a necessary criterion for a method to "otherwise fully provide all benefit liabilities under the plan." And creating such a requirement out of whole cloth would run contrary both to the regulatory actions preceding SEPPAA that Congress is presumed to have had in mind when it chose the critical statutory phrase, and the purpose of Title IV to encourage the continuation of defined benefit plans. *See* 26-31, *supra*.

For all of these reasons, the proposed merger of the Crown plan into PIUMPF would have satisfied the requirements that it effect a distribution of plan assets and fully provide all benefit liabilities under the plan within the meaning of § 1341(b)(3). As a means other than purchase of annuities, it was also required to be in accordance with the terms of the plan and in accordance with "any applicable regulations." As we discussed above, the district court found that the merger would have been in accordance with the terms of the plan and that ruling is not challenged here. Page 16 *supra*. We now turn to the applicable regulations and show that the proposed merger would have been fully in accordance with those regulations.

D. The proposed merger with PIUMPF would have been in accordance with applicable regulations.

Section 1341(b)(3)(A)(ii), as we have seen, provides that in implementing a standard termination, a plan administrator may use a method other than an annuity contract for "distributing [plan] assets" but, if so, the administrator shall "in accordance with the provisions of the plan and *any applicable regulations* otherwise fully provide all benefit liabilities under the plan." (Emphasis supplied.)

While the government asserts in its brief that the PBGC regulations do not permit a plan merger as a method of implementing plan termination, that assertion is not consistent with the applicable regulations or with PBGC's regulatory actions outside of litigation. We discuss the applicable regulations and PBGC's regulatory actions in this section. In Section E we demonstrate that the Court's standards for giving weight to an agency's interpretation of its own regulations are not satisfied, and that the litigating position announced in the government brief to this Court is not entitled to deference.

1. The sole applicable regulation states as follows:

> Method of distribution—(1) In general. The plan administrator must, in accordance with all applicable requirements under the Code and ERISA, distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer *or in another permitted form.*

29 C.F.R. § 4041.28(c)(1) (2006) (emphasis supplied). The beginning, middle, and end of this language is that there are permitted forms for distributing plan assets in addition to the "purchase of an irrevocable commitment" from an insurer. Nothing in the regulation can possibly be read as providing that only a lump sum cash distribution or rollover into an individual retirement account is a permitted form. And everything we have said about the underlying statute supports the conclusion that a distribution method that is the legal equivalent of purchasing an annuity contract in fully providing all benefit liabilities under the plan also comes within the term "another permitted form [of distribution]."

2. On the one occasion on which the PBGC considered the issue raised in this case, the PBGC concluded that transferring assets and liabilities to a multiemployer plan is a permissible method of distributing assets upon plan termination, without purchasing annuities. In 1985, a company requested the PBGC's opinion regarding whether the Joint Implementation Guidelines on Asset Reversions applied to a proposed transaction in which an employer would transfer a single-employer plan's assets and liabilities to a multiemployer plan, and, in so doing, terminate the single-employer plan and take a reversion of surplus assets from it. PBGC Op. Letter 85-25 (Oct. 11, 1985). These Joint Implementation Guidelines, discussed *supra* at 29, provided that when plan assets were being spun off into a new plan as part of a termination, "no termination will be recognized and any attempt to recover surplus assets will be treated as a

diversion of assets for a purpose other than the exclusive benefit of employees and beneficiaries" unless the participants' accrued benefits are fully vested and *"[a]ll benefits accrued as of the date of termination in the ongoing plan [are] provided for by the purchase of annuity contracts* which represent irrevocable commitments for the benefit of each individual participant." Joint Implementation Guidelines on Asset Reversions, PBGC News Release 84-23 (emphasis supplied).

In responding to this company's inquiry regarding the Joint Implementation Guidelines, the facts set forth by the PBGC closely parallel the proposed Crown-PIUMPF transaction:

> [A] company that currently maintains a single-employer plan covering its union employees . . . has proposed a termination of its single-employer plan, with a resultant reversion of excess assets to the company (as permitted by the plan document). The union that represents the company's employees is willing to agree to the termination subject to certain conditions, one of which is that the company become a participant in, and transfer assets and liabilities to, a multiemployer pension plan to which the union is already a party. The multiemployer plan in question is fully funded.

PBGC Op. Letter 85-25 (Oct. 11, 1985). The PBGC concluded that "a transfer from a single-employer plan to an ongoing multiemployer plan followed by the termination of the single-employer plan, is not generally a transaction to which the spin-off/termination requirements of the guidelines [*i.e.*, "the purchase of annuity contracts which represent irrevocable commitments for the benefit of each individual participant"] apply." *Id.*[16]

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[16] The PBGC went on to say that "if the transaction lacks a substantial business purpose and instead is intended as a means to recover surplus plan assets without satisfying the plan termination requirements of Title IV of ERISA, the PBGC will not recognize the termination." *Id.* This

The government now attempts to explain away this 1985 Opinion letter—without disavowing it—by stating that the letter did not "suggest that the termination could be accomplished without following the ordinary procedure of purchasing annuities or otherwise distributing the assets of the terminating plan to the participants and beneficiaries." Gov't Br. at 26. That, however, is the only logical reading of the Opinion Letter. In asking if the Guidelines applied, the company was asking if it need adhere to the Guidelines' requirement that benefits "must be provided for by the purchase of annuity contracts which represent irrevocable commitments," or whether, instead, it could "transfer assets and liabilities to[] a multiemployer pension plan." By responding that the Guidelines did not apply, the PBGC expressed the opinion that such a transaction would be a valid plan termination and that *purchase of an annuity contract was not required.* This is precisely as the letter is described in a treatise co-written by the author of that opinion letter. Veal & Mackiewicz, *supra*, at 172-73 ("A transfer of assets and liabilities from a single-employer plan to a multiemployer pension plan is not a spinoff for purposes of the guidelines. The plan sponsor may terminate the remaining portion of the plan and receive a reversion without regard to whether the multiemployer plan annuitizes any benefits.")

The government also attempts to avoid the import of the 1985 Opinion Letter by pointing out that it predates the creation of the statutory language here. Gov't Br. at 25. However, that litigating statement contradicts PBGC's regulatory pronouncements. After enactment of the 1986 and

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merely restates the PBGC's ongoing rule that sham terminations implemented without a substantial business justification and only to obtain a reversion would not be recognized. There was no suggestion that the termination at issue, in which the employer was motivated by a desire to comply with the union's request for the multiemployer plan to take over the benefit liabilities, lacked a substantial business justification.

1987 amendments, PBGC reaffirmed the Guidelines and has never disavowed the opinion letters it issued to interpret them. *See, e.g.*, 57 Fed. Reg. 59206, 59212 (Dec. 14, 1992) ("In order to have a valid termination in a spin-off/ termination transaction involving asset reversions to the contributing sponsor, plan administrators must comply with the Implementation Guidelines . . . ."); 53 Fed. Reg. 1904, 1905 (Jan. 22, 1988) ("It should be noted that the [Pension Protection Act of 1987] does not change the Joint Implementation Guidelines issued . . . on May 24, 1984.") *See also* Veal & Mackiewicz, *supra*, at 168-74.

3. Indeed, to the extent that the PBGC has changed its regulations regarding distribution of assets since the enactment of SEPPAA, it has moved towards granting plan administrators greater flexibility, not less. Prior to 1997, the regulations contained a section entitled "Annuity requirements" requiring that:

> [W]hen a plan is closed out under Sec. 4041.27 (in a standard termination) . . ., any benefit that is payable as an annuity under the provisions of the plan must be provided in annuity form through the purchase from an insurer of a single premium, nonparticipating, nonsurrenderable annuity contract that constitutes an irrevocable commitment by the insurer to provide the benefits purchased.

29 C.F.R. § 4041.6(a) (1996), 61 Fed. Reg. 34002, 34042 (July 1, 1996).[17] Subsection (b) of that section stated that the only exceptions (other than a provision for participating annuities in subsection (d)) would be an alternative form of distribution *if* permitted under the plan *and if* either the actuarial present value of the benefit was less than $3,500 or the participant elected the alternative distribution form in

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[17] These regulations were, in pertinent part, substantively unchanged between 1981 and 1997. *Compare* language cited in text *with* 29 C.F.R. §§ 2615.4, 2615.21 (1981), 46 Fed. Reg. 9532 (Jan. 28, 1981).

writing. *Id.* at 34042-43. Similarly, the pre-1997 regulations provided:

> Method of distribution. The plan administrator shall distribute plan assets in accordance with Sec. 4041.6 by purchasing irrevocable commitments from an insurer in satisfaction of all benefit liabilities that must be provided in annuity form, and by otherwise providing all benefit liabilities that need not be provided in annuity form.

29 C.F.R. § 4041.27(c) (1996), 61 Fed. Reg. at 34048. Read together, the two paragraphs required distribution of all benefits "payable as an annuity under the provisions of the plan" in the form of an annuity contract, and gave the plan administrator latitude to "otherwise provid[e]" distributions only in very limited circumstances.

In 1997, the PBGC substantially revised the pertinent regulations, in a manner that permitted additional methods of providing for benefit liabilities. "[R]evising and simplifying the standard termination process," the PBGC eliminated the "Annuity requirement" provision formerly contained in § 4041.6(a), and affirmatively broadened the "Method of distribution" language (formerly § 4041.27(c)) to the language currently contained in § 4041.28(c)(1), authorizing plan administrators to "distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer or in another permitted form." Nowhere in the regulation did PBGC attempt to catalog those other "permitted form[s]" or specify any criteria that would have to be met for an alternative to be a "permitted form." The regulation thus gave plan administrators more latitude to distribute plan assets by means other than an annuity. 62 Fed. Reg. 60424, 60434 (Nov. 7, 1997). The broader rule adopted by the PBGC necessarily permits that which was permitted under the predecessor, narrow rule—namely, the method of distribution addressed in Opinion Letter 85-25 and proposed by PIUMPF here.

4. Lacking any regulation that limits a plan administrator's choice of methods to "otherwise fully provide all benefit liabilities," Petitioner argues that the broad wording of § 4041.28(c)(1) actually operates as a limitation, prohibiting distribution forms other than purchase of annuities or lump-sum payments. *See* Pet'r Br. at 23-24. That argument is contradicted by the government, which concedes that § 4041.28(c)(1) "could conceivably encompass a distribution method other than a lump sum payment or rollover." Gov't Br. at 23.

The government in its turn, however, contends that the word "satisfaction" in § 4041.28(c)(1) requires both a distribution of assets among the various beneficiaries of the plan and contemporaneous receipt of benefits by those entitled to them. Gov't Br. at 21-22. This interpretation—advanced for the first time in the government's amicus brief—is untenable. As we explained in discussing the underlying statute, a transfer of plan assets to another plan and assumption of the terminating plan's liabilities by that plan "satisfies" the terminating plan's obligation to the beneficiaries in the same way that purchase of an annuity does, because it discharges the first plan's obligation to the plan beneficiaries, similar to a novation under the common law of contracts.

The government points to only one additional regulation, 29 C.F.R. § 4041.23(b)(9), as arguably inconsistent with merger of a terminating plan into a multiemployer plan as a means of implementing a standard termination. Gov't Br. at 22. This regulation requires that participants in a terminating plan be provided a notice stating that "after plan assets have been distributed in full satisfaction of all plan benefits under the plan with respect to a participant or a beneficiary of a deceased participant, either by the purchase of irrevocable commitments (annuity contracts) or by an alternative form of distribution provided for under the plan, the PBGC no longer guarantees that participant's or beneficiary's plan benefits."

29 C.F.R. § 4041.23(b)(9). This notice regulation cannot bear the weight the government would put on it.

The mere fact that the PBGC has provided a notice requirement designed for what are by far the most common distribution methods—purchase of an annuity contract or issuance of lump-sum payments—cannot be read as an outright prohibition on any other type of distribution. To read a simple notice requirement to impose such a substantive limitation on a statutory provision is asking too much, particularly where the portions of the regulation that specifically address the distribution of assets upon termination are broader. And, in any event, it is entirely possible for a plan administrator to comply with § 4041.23 when implementing a termination through merger. In such a termination, it would be true that the PBGC no longer guarantees the benefits under the original plan—indeed, the PBGC guarantee of benefits under a multiemployer plan would be substantively different.[18] It would be appropriate to issue notice to participants and beneficiaries informing them that the original PBGC guarantee has been extinguished and telling them of the new guarantee terms.

The foregoing represents the totality of the government's and Petitioner's arguments that merger as a means of distributing plan assets in a termination is inconsistent with the applicable regulations. But *amicus* Chamber of Commerce offers some additional arguments, mainly in an attempt to rewrite the history of PBGC's position on alternate forms of distribution. The Chamber does, in addition, cite one regulation—the PBGC's definition of "distribution date," contained in 29 C.F.R. § 4001.2—which it claims is inconsistent with merger as a means of distribution of assets. However, far from being inconsistent with merger as a method of dis-

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[18] *Compare* 29 C.F.R. § 2520.102-3(m)(3) (description of PBGC guarantee that the Department of Labor prescribes for inclusion in single-employer summary plan descriptions) *with id.* § 2520.102-3(m)(4) (same for multiemployer plans).

tribution, this regulation recognizes that assets may be distributed to another plan:

> For benefits provided other than through the purchase of irrevocable commitments, the date on which the benefits are delivered to the participant or beneficiary (*or to another plan or benefit arrangement* or other recipient authorized by the participant or beneficiary in accordance with applicable law and regulations) . . . .

29 C.F.R. § 4001.2(1)(ii) (emphasis supplied).

As to the PBGC practices over the years, the Chamber cites two current documents, neither of which purports to replace the PBGC regulations and both of which refer readers to the statute and regulations themselves for the authoritative statement of termination requirements[19]: 1) a PBGC "Small Business Guide" issued in October 1998, and 2) the PBGC Standard Termination Filing Instructions. *See* Chamber Br. at 11-12. The rest of the materials the Chamber cites were issued by the PBGC prior to the 1997 change in the regulations: 1) a 1988 advisory notice issued to alert the public to changes in ERISA made by the Pension Protection Act of 1987, 53 Fed. Reg. 1904, 1905 (Jan. 22, 1988), Chamber Br. at 5, 9, and 2) the preamble to PBGC regulations issued in 1981, 46 Fed. Reg. 9532, 9534 (Jan. 28, 1981), Chamber Br. at 13-14. Although the Chamber does not so much as acknowledge that PBGC revised its regulations in 1997, the change in that year was substantive, as discussed at 42-43, *supra*. The pre-1997 documents that the Chamber cites

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[19] *See* PBGC, Small Business Guide 1, Pub. 1008 (Oct. 1998), *available at* http://www.pbgc.gov/docs/small%20business%20guide.pdf ("This Guide is an aid, but it does not replace the statutes and regulations that contain the legal requirements for pension plans."); PBGC, Standard Termination Filing Instructions 2, *available at* http://www.pbgc.gov/docs/500_instructions.pdf (last visited April 3, 2007) ("The specific rules for terminating a single-employer plan in a standard termination are set forth in sections 4041(a), 4041(b) and 4050 of [ERISA] . . . and in the PBGC's regulations . . . .")

merely express the PBGC's interpretation of its *prior* regulation and do nothing to advance the Petitioner's case.[20]

E. The Court should not defer to the interpretation of PBGC regulations that was advanced in the government's brief.

Although, for the sake of clarity, we have saved our rebuttal for last, we recognize that the government argues that PBGC's interpretation of its regulations—as asserted in its brief in this Court—is entitled to deference under this Court's ruling in *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Gov't Br. at 21. Stated simply, the government's call for *Auer* deference here is entirely misplaced.

As a general matter, this Court has declined to defer "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice," because "'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'" *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (quoting *Investment Co. Institute v. Camp*, 401 U.S. 617, 628 (1971)). This principle has particular force where the agency's litigating position is contrary to a view the agency has expressed in the past. *Id.*

And in *Gonzales v. Oregon*, 126 S. Ct. at 914, the Court—while reiterating *Auer*'s point that "[a]n administrative rule may receive substantial deference if it interprets the issuing

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[20] Moreover, the purpose of the 1988 advisory notice was to alert the public to statutory amendments in the Pension Protection Act of 1987, changes that had nothing to do with the language at issue in this case. The primary change effected by the PPA was "the increase in plan benefits that must be paid in order for a plan to terminate in a standard termination," 53 Fed. Reg. at 1905, specifically through expanding the requirement to pay "benefit commitments" to the broader "benefit liabilities." Pub. L. No. 100-203, § 9313(a)(2)(C)(i), 101 Stat. 1330 (1987). It is clear from the text of the advisory notice that the PBGC's focus was on advising employers of their liability for larger amounts of plan benefits.

agency's own ambiguous regulation," *id.*—added that *Auer* deference *does not apply* when the "underlying regulation does little more than restate the terms of the statute":

> In *Auer*, the underlying regulations gave specificity to a statutory scheme the Secretary was charged with enforcing and reflected the considerable experience and expertise the Department of Labor had acquired over time with respect to the complexities of the Fair Labor Standards Act. Here, on the other hand, the underlying regulation does little more than restate the terms of the statute itself. The language the Interpretive Rule addresses comes from Congress, not the Attorney General, and the near-equivalence of the statute and regulation belies the Government's argument for *Auer* deference.

Id. at 915. In such a case, the agency's interpretations are entitled to only *Skidmore* deference, *id.* at 922, meaning they are "'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade.'" *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (quoting *Skidmore*, 323 U.S. at 140).[21]

Here, as was the case in *Gonzales v. Oregon*, the PBGC regulation does little more than restate the statute itself.

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[21] *Auer v. Robbins* specifically involved the Secretary of Labor's interpretation, advanced in an *amicus* brief, of the Department of Labor's regulation setting forth the "salary basis" test for certain exemptions under the Fair Labor Standards Act. The *amicus* brief provided the Secretary's view of how the salary basis test, a complex requirement developed entirely as a matter of agency regulation, applied to a specific factual situation— namely, whether the requirement that an employee's salary not be "subject to reduction because of variations in the quality or quantity of the work performed" is violated "when employees are covered by a policy that permits disciplinary or other deductions in pay 'as a practical matter'" but where that policy is not necessarily applied. *Id.* at 461-62. The Court's decision to defer to the Secretary's interpretation relied heavily on the fact that "the salary-basis test is a creature of the Secretary's own regulations." 519 U.S. at 461.

Compare 29 U.S.C. § 1341(b)(3)(A) ("In distributing [plan] assets, the plan administrator shall—(i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or (ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan") *with* 29 C.F.R. § 4041.28(c)(1) ("The plan administrator must, in accordance with all applicable requirements under the Code and ERISA, distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer or in another permitted form.") The substitution of the unelaborated words "or in another permitted form" for the statutory term "otherwise fully provide" gives no specificity to the statutory scheme, and reflects no considered judgment or expertise of the PBGC. *See Gonzales*, 126 S. Ct. at 915.

Despite having no regulation that provides a gloss on § 1341(b)(3)(A)(ii) and its authorization of methods to distribute assets that "otherwise fully provide" for a terminating plan's benefit liabilities, and having no regulations at all governing mergers of single-employer plans into multiemployer plans, the PBGC now seeks to advance through an *amicus* brief a substantive interpretation of § 1341(b)(3)(A)(ii) that is squarely at odds with that provision's plain meaning. The PBGC does so despite the fact that a decade ago, it affirmatively changed its own regulation in a manner that is inconsistent with its litigation argument. *Cf. Caruso v. Blockbuster-Sony Music Entm't Centre*, 193 F.3d 730, 736-37 (3d Cir. 1999) (declining to defer to agency position articulated in Technical Assistance Manual, where notice and comment rulemaking intentionally left question unresolved). And the PBGC does so without explaining why, on the one previous occasion when it was confronted with this same question, it came to the opposite conclusion. These are precisely the sort of circumstances which have led this Court

to treat an agency's litigating position with "near indifference." *Mead Corp.*, 533 U.S. at 227-28.[22]

CONCLUSION

For all of the foregoing reasons, this Court should affirm the judgment of the Court of Appeals in this case.

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[22] Moreover, it bears noting that the PBGC—unlike the Department of Labor in *Auer*—is not a disinterested party. While, in *Auer*, the Department of Labor was advancing its views regarding the regulation of conduct between third parties, the PBGC, as demonstrated in the government's brief, seems to be motivated by a desire to limit the breadth of coverage of its insurance program. *See* Gov't Br. at 29-30. This intent may well be at odds with Congress's intent, which was to foster the establishment and maintenance of defined benefit plans. *See* SEPPAA § 11002(c)(2) (1987) ("It is hereby declared to be the policy of this title . . . to encourage the maintenance and growth of single-employer defined benefit pension plans . . . ."); Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 3(c)(3), 94 Stat. 1208 (1980) ("It is hereby declared to be the policy of this Act . . . to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans.")

APPENDIX

APPENDIX

STATUTES AND REGULATIONS

29 U.S.C. § 1002

Sec. 1002. Definitions

For purposes of this subchapter:

* * * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

* * * *

29 U.S.C. § 1341

Sec. 1341. Termination of single-employer plans

* * * *

(b) Standard termination of single-employer plans

* * * *

(3) Methods of final distribution of assets

(A) In general

In connection with any final distribution of assets pursuant to the standard termination of the plan under this subsection, the plan administrator shall distribute the assets in accordance with section 1344 of this title. In distributing such assets, the plan administrator shall—

(i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or

(ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan. A transfer of assets to the corporation in accordance with section 1350 of this title on behalf of a missing participant shall satisfy this subparagraph with respect to such participant.

(B) Certification to the corporation of final distribution of assets

Within 30 days after the final distribution of assets is completed pursuant to the standard termination of the plan under this subsection, the plan administrator shall send a notice to the corporation certifying that the assets of the plan have been distributed in accordance with the provisions of subparagraph (A) so as to pay all benefit liabilities under the plan.

* * * *

29 C.F.R. § 4041.28

Sec. 4041.28. Closeout of plan.

* * * *

(c) Method of distribution—(1) In general. The plan administrator must, in accordance with all applicable requirements under the Code and ERISA, distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer or in another permitted form.

* * * *

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No. 05-144

In the

Supreme Court of the United States

JEFFREY H. BECK,
Liquidating Trustee of the Estates of
Crown Vantage, Inc. and Crown Paper Company,
Petitioner,

v.

PACE INTERNATIONAL UNION,
EDWARD J. MILLER, and JEFFREY D. MACEK,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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April 17, 2007

CORPORATE DISCLOSURE STATEMENT

Petitioner incorporates by reference the Corporate Disclosure Statement included in its Petition for Writ of Certiorari filed on May 10, 2006.

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ARGUMENT

I. Crown's Merger Decision Was a Non-Fiduciary Plan Sponsor Function.

A. Under this Court's decisions interpreting ERISA's definition of fiduciary, 29 U.S.C. § 1002(21)(A), decisions concerning "adopt[ing]" or "modify[ing]" a pension plan, *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995), "amending or terminating a plan," *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (internal quotations omitted), "the composition or design of the plan itself," *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999), or "the content of a plan," *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000), are not fiduciary acts. Confronted by this line of decisions, which the Ninth Circuit ignored, PACE concedes that a decision concerning the merger of *ongoing* plans is a non-fiduciary plan sponsor function. Resp. Br. at 13–14 n.5.

PACE argues that in this instance, however, Crown's merger decision was a fiduciary act because the decision occurred in the context of termination discussions. *Id.* at 19-21. PACE notes that § 1002(21)(A) imposes fiduciary duties on the disposition of plan assets, and argues that a merger involves a disposition of plan assets. *Id.* at 14–17. PACE also argues that in the context of termination, merger has no impact on plan structure or benefits, because the benefits provided by the successor plan are equal to those provided in the original plan. *Id.* at 19–20.

B.1. Crown's decision to reject PACE's merger proposal, and to not revisit its termination decision, involved the form and content of its plans at the most basic level: whether to merge the plans into PIUMPF, subjecting plan participants to the terms of PIUMPF.[1] Because

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[1] Indeed, PACE has previously stressed the change in plan terms that merger with PIUMPF would cause, as part of its assertions that merger would have been beneficial for plan par-

a merger decision determines the terms that will govern plan participants, *see, e.g.*, Pl. Ex. 25, at 00497 (Bankr. Dkt. 22, at 56, 89) (draft merger agreement providing Crown plan would be merged into PIUMPF "on the basis, terms, and conditions herein"), it is a non-fiduciary function as much as a decision to create, amend, modify, or terminate a plan. Precisely because a merger decision is a plan sponsor function, PACE's draft merger agreement provided that Crown would execute the agreement in its plan *sponsor* capacity. *See id.* (agreement would be signed by Crown "*on behalf of certain pension plans that it sponsors*") (emphasis added).[2]

2. Not only does a merger decision in the context of termination implicate plan terms, it also directly affects the form in which the plan provides benefits. In a standard termination, plan assets are distributed to participants in the form of annuity contracts or lump sum payments. By reversing a termination decision and instead opting to merge, a plan sponsor would be choosing to maintain the plan's benefits through the acquiring plan.

3. PACE argues that the benefits available through its merger proposal would have been identical to the benefits provided in Crown's plan, so there would have been no change in benefits resulting from a merger.

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ticipants. *See, e.g.*, Pet. App. 5, 32, 57 (discussing PIUMPF's unique dispute resolution terms).

[2] PACE's transmittal letter forwarding the draft merger proposal further underscores that PACE contemplated that its merger proposal was made to Crown in the latter's plan sponsor capacity: "Attached is a draft Merger Agreement to reflect the proposed merger between certain plans *sponsored by Crown Vantage* and the PACE Industry Union-Management Pension Fund ('PACE Fund'). This is a rough draft of the proposed Merger Agreement, *but we wanted to provide you with a document that reflects our understanding of how the transaction will be structured.*" Pl. Ex. 25, at 00495 (Bankr. Dkt. 22, at 56, 89) (emphasis added).

Resp. Br. at 19–20. Yet PACE's arguments below relied on several effects merger into PIUMPF would have on participant benefits, including the potential that participants could receive increased benefits or benefits in a different form. *See* Pet. App. at 5, 32, 57 (discussing "thirteenth monthly check"); *see also* Tr. of Proceedings, Nov. 29, 2001 (Bankr. Dkt. 22), at 61–65 (discussing plan differences). In any event, as PACE's draft merger agreement recognized, the level of benefits provided by merger would have depended upon the terms agreed to by Crown and PACE. *See* Pl. Ex. 25, at 00497 (Bankr. Dkt. 22, at 56, 89). Negotiation of those terms was a non-fiduciary function performed by the respective plan sponsors, Crown and PACE.

4. Crown's choice between standard termination and merger singularly determined the level of benefits participants received. "When an employer voluntarily terminates a single-employer defined benefit plan, all accrued benefits automatically vest, notwithstanding the plan's particular vesting provisions." *Mead Corp. v. Tilley*, 490 U.S. 714, 717 (1989) (citing 26 U.S.C. § 411(d)(3)). ERISA, however, does not similarly require automatic vesting upon the consummation of a merger. *See Ortberg v. Capsonic Group, Inc.*, No. 90-6535, 1991 U.S. Dist. LEXIS 1833, at *6–13 (N.D. Ill. Feb. 12, 1991) (merger of pension plan was not termination; participant did not enjoy automatic vesting of accrued benefits in merger). Merger also would not have provided plan participants with the extra assets attributable to their individual contributions, even though participants had a right to such assets in termination. *See* 29 U.S.C. § 1344(d)(3)(A); *see also* Pet'r Br. at 33–34. Thus, while PACE's draft merger agreement provided the same level of benefits that participants enjoyed *prior* to termination, PACE's

proposal did not provide for the additional benefits that plan members enjoyed by *virtue* of termination.[3]

C. PACE argues that under the common law of trusts, the disposition of trust assets is a trustee function. *See* Resp. Br. at 14–15. At common law, however, a trustee lacks the power to make decisions concerning trust terms, as such decisions are settlor functions. *See* Restatement (Second) of Trusts § 4, at 13 (1959) ("Restatement") ("The phrase 'terms of the trust' means the manifestation of intention of the settlor with respect to the trust expressed in a manner which admits of its proof in judicial proceedings."); *see also Varity Corp. v. Howe*, 516 U.S. 489, 505 (1996) ("[I]t may be true that amending or terminating a plan (or a common law trust) is beyond the power of a plan administrator (or trustee)—and, therefore, cannot be an act of plan 'management' or 'administration.'"). A trustee therefore lacks the power to *choose* to transfer assets to another trust through merger; such a transfer must either be authorized by the trust's beneficiary or ordered by a court. *See* Restatement § 226, at 523 (trustee is liable "if he pays or conveys to a person who is neither the beneficiary nor one to whom the beneficiary or the court has authorized him to make such payment or conveyance").[4] Hence, a decision *whether* to merge, like

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[3] PACE's merger proposal provided that "[a]ccrued benefits of the former participants of the Crown Vantage Plans will be paid and administered by the PACE Fund in accordance with the applicable Crown Vantage Plan." Pl. Ex. 25, at Ex. G (Bankr. Dkt. 22, at 56, 89). Thus, accrued benefits that had not vested by the time of merger with PIUMPF would have remained forfeitable after a merger.

[4] PACE argues that it is a "common practice" for trustees to distribute trust assets to another trust, rather than directly to the beneficiary. Resp. Br. at 34 & n.12. The authorities cited by PACE actually stand for different propositions, namely, that a trustee may distribute assets to another trust when the beneficiary is a minor or suffers some other legal disability, or

any other decision concerning plan terms, is not a disposition of plan assets within the meaning of 29 U.S.C. § 1002(21)(A) or the common law, any more than a decision whether to terminate is a disposition of assets.

D. PACE argues that "the plan document allowed the plan administrator to implement the sponsor's termination decision through a merger." Resp. Br. at 16; *see also id.* at 21. To the extent that PACE argues that the Crown plan document made Crown's merger decision a fiduciary function, PACE is wrong both in law and fact.

Under ERISA, the mere fact that a plan assigns to the plan administrator a decision that by its nature is a settler function does not transform that decision into a fiduciary act. Whether a given function is a fiduciary act under ERISA turns not on what *person* performs the function, however that person may be denominated under the plan document, but on the nature of the function itself; ERISA "does not describe fiduciaries simply as administrators of the plan, or managers or advisers. Instead it defines an administrator, for example, as a fiduciary only *'to the extent'* that he acts in such a capacity in relation to a plan." *Pegram*, 530 U.S. at 225–6 (emphasis added). Were a plan document's denomination of a person as plan administrator or plan sponsor determinative of the fiduciary status of functions performed by such person, ERISA's fiduciary duties could be avoided

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that a trust can distribute to another trust when the second trust is a beneficiary of the first. *See* Uniform Trust Code § 816(21)(B) (trustee to trustee distribution permissible when beneficiary is minor or is incapacitated); IV Scott on Trusts § 347.7, at 579–80 (4th ed. 1989) (recognizing trust-to-trust distribution when the latter is a beneficiary of the former). Absent legal disability on the part of a beneficiary or the designation of another trust as a beneficiary, there is no authority at common law for a trustee to make a trust-to-trust distribution of trust assets.

altogether by the simple expedient of denominating fiduciary functions as plan sponsor decisions—surely an inconceivable result.

PACE is also wrong as a matter of fact. The plan document's discussion of merger is not in the context of termination, and is silent as to whether merger is a plan sponsor or plan administrator function. *See* J.A. 81, at ¶12.5 (D. Dkt. 14, at Tab 6). Although the district court held that "the plan terms do not bar a merger with PIUMPF," Pet. App. 47, the court did not state that the plan assigns the *decision* of whether to merge to the plan administrator, or that the decision should be made in a fiduciary capacity. *See ibid.*[5]

E. As Crown noted in its opening brief, the Ninth Circuit essentially employed a temporal test to determine whether a merger decision is a fiduciary function. Under the Ninth Circuit's test, a merger decision made before a termination decision is a non-fiduciary plan sponsor function, but a merger decision made after a termination decision is deemed fiduciary. *See* Pet'r Br. at 18–19. PACE's "contextual" test is also temporal, because PACE concedes that merger between ongoing plans is a plan sponsor function. *See* Resp. Br. at 13–14 n.5. Yet ERISA's fiduciary provisions do not distinguish between merger of

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[5] PACE contends that the district court's construction of the plan document is binding in this Court. That cannot be, as the Ninth Circuit held that it would not review that construction because Crown did not properly present the issue to the bankruptcy court in the first instance. Pet. App. 10. As the Ninth Circuit thereby implicitly vacated the district court's construction of the plan document, the district court's construction is not law of the case. *See* 18B Wright, Miller & Cooper, Federal Practice and Procedure § 4478, at 655 (2d ed. 2002) (implicitly vacated district court determination "ceases to be the law of the case"). In any event, to the extent that construction of the plan document is necessary to resolve the question presented, it is fairly included therein.

a plan considered for termination and merger of an ongoing plan. In both cases, the plan's separate existence ends, not through ERISA standard termination procedure, but rather through assumption into the acquiring plan. In both cases, the assets of one plan are transferred to the other, rather than to plan participants. And in both cases, the terms of the successor plan, and the form and level of benefits provided therein, depend upon the agreement negotiated between the plan sponsors of the original plans. Consequently, a merger decision is a non-fiduciary sponsor function whenever it is made.

II. ERISA's Text and Structure Do Not Allow Merger As a Means of Termination.

A. Merger Cannot Serve As a Means of Termination Under 29 U.S.C. § 1341.

As Crown has explained, merger cannot serve as a means of implementing the standard termination of a pension plan because it does not satisfy the plain textual requirements set forth in 29 U.S.C. § 1341(b)(3)(A)(ii)—distribution to plan participants that fully provides all benefits. Pet'r Br. at 21–28; *see also* Gov't Br. at 18–20. PACE claims in response that because § 1341(b)(3)(A)(i) provides express authorization for annuitization as a means of distributing plan assets, § 1341(b)(3)(A)(ii) should be read to authorize plan termination through the "legal equivalent" of annuitization. Resp. Br. at 22–27.

1. PACE derives its equivalency test from a single word in § 1341(b)(3)(A)(ii): "otherwise." PACE argues that "[b]ecause Congress plainly intended [annuitization] to be a method to 'fully provide all benefit liabilities,' and because Congress expressly permitted methods that 'otherwise' accomplish that objective," it follows that the legal equivalents of annuitization satisfy subsection (ii). Resp. Br. at 23–24. PACE's argument is premised on a connective reading of "otherwise"—*i.e.*, an assumption that the term means that the annuitization process set

forth in subsection (i) is an example of a method of fully providing benefit liabilities under subsection (ii).

Contrary to PACE's argument, "otherwise" is used in § 1341(b)(3)(A)(ii) as a term of *disjunction*, separating annuitization, one method of distributing assets during a termination, from a second, distinct method: the immediate, complete payment of plan benefits.[6] A disjunctive reading of "otherwise" is reinforced by Congress's use of the disjunctive "or" separating subsections (i) and (ii). "Canons of construction indicate that terms connected in the disjunctive . . . be given separate meanings." *Garcia v. United States*, 469 U.S. 70, 73 (1984). Congress's use of "or" to differentiate between § 1341(b)(3)(A)'s two distribution methods, coupled with its use of the word "otherwise" in subsection (ii), leads to the inference that the two methods are different, rather than overlapping.

The substantive wording of subsections (i) and (ii) confirms that the two methods of distribution are entirely distinct. Subsection (i) requires plan administrators to purchase irrevocable commitments "to provide" benefit liabilities—*i.e.*, an irrevocable obligation from an insurer to pay benefits *over time*. By contrast, compliance with subsection (ii) requires that the administrator "fully provide all benefit liabilities under the plan" to the participants—*i.e.*, a lump sum payment of *all* outstanding liabilities. Subsection (i)'s provision requirement is phrased as an infinitive, authorizing purchase of a specifically-identified future commitment to pay; subsection (ii)'s provision requirement is in the present tense, and therefore can only be satisfied by immediate payment of *full* benefit liabilities. This grammatical difference establishes that speculative "benefit promises," such as those offered by PACE's proposed merger, cannot satisfy the present tense

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[6] "Otherwise" means "[i]n another way; differently." The American Heritage Dictionary of the English Language 931 (1981).

payment requirement of subsection (ii), notwithstanding the fact that annuitization satisfies subsection (i).

PACE argues that if Congress meant to limit the scope of subsection (ii) to "lump sum" distributions, it could have used that precise phrase, as it did in 26 U.S.C. § 402(e)(4). Resp. Br. at 32 & n.9. Although the text of § 1341(b)(3)(A)(ii) theoretically permits other distribution methods so long as such methods comply with its requirements, those requirements are only satisfied by immediate payment of full benefit liabilites. The only known distribution method that satisfies these requirements is a lump sum distribution, either in the form of payment to participants or rollovers to participants' individual retirement accounts. If any other distribution method satisfies § 1341(b)(3)(A)(ii), neither the government nor PACE has identified such a method.[7]

In sum, § 1341 mandates that in a standard termination plan assets must be distributed through one of two *independent* methods. Under subsection (i), termination can be achieved through the purchase of an irrevocable commitment to provide plan participants with their benefits over time. Otherwise, under subsection (ii), the administrator must fully provide benefit liabilities to plan participants—an option that has only been satisfied through immediate, complete, lump sum cash payment to the plan participants. Section 1341(b)(3)(A) treats these two options differently, and PACE makes no effort to

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[7] To the extent that the PBGC's regulation appears to recognize forms of distribution other than the purchase of annuities and lump sum payments, *see* 29 C.F.R. § 4041.28(c)(1) (requiring plan administrator to distribute assets in a standard termination by the purchase of annuities or "in another permitted form"), the other "permitted form" is the transfer of assets to the PBGC in the case of missing participants, as authorized by the second sentence of § 1341(b)(3)(A)(ii).

assert that merger is legally equivalent to direct payment under subsection (ii), nor could it. But PACE cannot excuse merger's failure to satisfy the requirements of subsection (ii) by attempting to analogize merger to the annuitization authorized in subsection (i), because § 1341(b)(3)(A) does not equate annuitization under subsection (i) with the distinct procedure authorized in subsection (ii). PACE's proposed "legal equivalent" standard therefore cannot be correct. As merger does not satisfy the actual textual requirements set forth in § 1341(b)(3)(A)(ii), it is not a method of effecting a standard termination under that section, despite any alleged similarity between merger and annuitization.

2. Even if PACE's legal equivalency test were correct, merger still would not satisfy § 1341, because merger into a multiemployer plan is *not* the legal equivalent of the purchase of irrevocable annuity commitments. The "promise to pay" provided by merger is fundamentally different from annuitization, which provides plan participants with an irrevocable commitment from an insurance company to provide benefits *independent* of the ERISA regime.[8] Equating merger with annuitization disregards a central point of plan termination—the end of ERISA responsibility for participants' benefits.

Merger similarly does not satisfy § 1341(b)(3)(A)'s requirement that in a termination plan assets be distributed in accordance with 29 U.S.C. § 1344, which requires a plan administrator to actually allocate the plan assets among its participants and beneficiaries. Pet'r Br. at 22–23. PACE claims that because a standard termination is only permissible when sufficient assets exist to cover all

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[8] Any insurance company selected to provide annuities is closely evaluated based on regulatory criteria, including state licensing, the quality of the insurer's portfolio, and the availability of additional protection through state guaranty associations. *See* 29 C.F.R. § 2509.95-1(b), (c).

of the priority categories listed in § 1344, no allocation actually occurs in a standard termination, and therefore a multiemployer plan's general promise to satisfy all of the priority categories in the future complies with § 1344. Resp. Br. at 35. Such a claim disregards the fact that annuitization, unlike merger, actually divides plan assets among the plan participants, who receive their allocation in the form of an individual, contractually enforceable right to their share of an annuity. *See* Gov't Br. at 20 (discussing individual allocation rule). In merger, on the other hand, no such allocation occurs. The original plan's assets are instead commingled into the multiemployer plan's general asset pool, of which the individual plan participants have no right to a specific share. *See Hughes Aircraft*, 525 U.S. at 440.[9] As part of this pool, the original plan's assets would be made available to satisfy the benefits of *other* participants in the multiemployer plan, rather than being singularly allocated to the Crown participants.

Merger arguably promises that participants in the § 1344 categories will receive payments at some future point; annuitization actually *allocates* the funds, as required by § 1344. Merger and annuitization are therefore not legally equivalent for the purposes of termination.

3. This conclusion fully conforms with § 1341's legislative history, despite PACE's claims to the contrary. PACE relies heavily on a version of § 1341(b)(3)(A)(ii)

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[9] PACE asserts that Crown and the government's prior arguments on this issue rely on an IRS regulation inapplicable to multiemployer plans. *See* Resp. Br. at 33 n.10. Although the regulation applies by its terms only to single-employer plans, the PBGC has made clear that the same analysis applies to multiemployer plans. See PBGC Op. Ltr. 84-2 (Jan. 17, 1984). Moreover, the requirement that all of the plan assets must be available to pay benefits to all of the plan participants and beneficiaries is inherent in the nature of a defined benefit plan.

that was originally proposed to Congress, which required the plan administrator, in non-annuitization terminations, to satisfy "the obligation to provide when due" all benefits under the plan. Resp. Br. at 30. According to PACE, even though this language was not adopted, it establishes that subsection (ii) permits payment over time because Congress subsequently enacted "a less restrictive rule." *Id.* at 30–31. PACE errs by relying upon language *rejected* by Congress—material that is irrelevant to interpretation of the language Congress actually enacted into law. *See, e.g., Tilley*, 490 U.S. at 723 ("We do not attach decisive significance to the unexplained disappearance of one word from an unenacted bill because 'mute intermediate legislative maneuvers' are not reliable indicators of congressional intent.").[10]

B. ERISA's Structure Precludes PACE's Theory of Termination By Merger.

ERISA's structure confirms that merger and termination are separate and distinct processes. The Ninth Circuit disregarded these structural differences, relying instead upon the placement of § 1341 (governing terminations) and 29 U.S.C. § 1412 (governing mergers) within Title IV of ERISA. *See* Pet'r Br. at 28–31. Tellingly, PACE makes no effort to defend this error. Instead, PACE attempts to minimize the structural conflicts created by its overly-expansive interpretation of § 1341.

1. As Crown has noted, 29 U.S.C. § 1058 expressly distinguishes between merger and termination, treating

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[10] Even if unenacted language *were* relevant, the difference between the proposed and adopted versions supports Crown's interpretation of § 1341. The language actually adopted by Congress is *narrower* than the unenacted language invoked by PACE. As adopted, subsection (ii) replaced the proposed "provide when due" language with a stricter obligation to "fully provide all benefit liabilities." 29 U.S.C. § 1341(b)(3)(A).

them as separate processes. The natural import of this section, as courts of appeals interpreting it have noted, is that the validity of a merger is judged by reference to terminations hypothetically conducted before and after the merger—a process that would be tautological if PACE's interpretation of § 1341 were correct. Pet'r Br. at 32; *see also Brillinger v. Gen. Elec. Co.*, 130 F.3d 61, 62 (2d Cir. 1997); *Malia v. Gen. Elec. Co.*, 23 F.3d 828, 831–32 (3d Cir. 1994) (contrasting "hypothetical termination" in merger with "actual termination").

In response, PACE notes that § 1058 "refer[s] to a common basis of calculating the extent of funding for benefit liabilities," Resp. Br. at 36 n.14, a statement that does not change the fact that this "common basis" conditions the validity of merger on an express comparison of two *separate* processes: merger and termination. PACE's claim that the provision, even if meaningless in cases of termination-by-merger, would still have value in other merger cases, *see ibid.*, further strains credibility—the more plausible reading is that merger is not, and cannot be, a method of implementing a standard termination.

2. PACE seeks to minimize the different notice requirements ERISA's implementing regulations impose on mergers and terminations by claiming that in some cases it would be possible for both notices to issue. *See ibid.* Such a claim disregards *substantive* differences between the separate notices. In termination, plan participants must be notified in advance that after termination "the PBGC no longer guarantees that participant's or beneficiary's plan benefits." 29 C.F.R. § 4041.23(b)(9). After merger, however, the PBGC in fact *continues* to guarantee a participant's benefits. *See* Pet'r Br. at 32–33; Gov't Br. at 22. The PBGC must receive advance notice of termination proposals in order to ensure compliance with regulatory requirements, yet ERISA's merger provisions do not provide for advance notice to either the PBGC or plan participants. *Ibid.* PACE claims that the

two systems can be reconciled, *see* Resp. Br. at 36–37, but the mere fact that ERISA *creates* these two independent systems, without any indication that they could apply simultaneously, implicitly establishes that merger and termination are in fact separate and unrelated processes.

3. PACE tries to explain away the fact that reversions to employers are available in termination but not in merger, *see* Pet'r Br. at 33–35 (citing 29 U.S.C. §§ 1344(d)(1) and 1103(c)), by claiming that PACE's proposal could have been restructured as a "transfer of assets and liabilities," rather than a complete merger of the Crown plans into PIUMPF.[11] However, such transfers still do not provide for a reversion to an employer. At most, they permit employers to restructure pension plans such that a reversion could be available in a subsequent termination. *See* Part III.A, *infra*. The merger or transfer is not *itself* a method of terminating a plan, nor does it in fact provide a reversion. Moreover, PACE simply fails to address the fact that in a termination, participants that made individual contributions to a plan

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[11] To the degree the distinction between "merger" and "transfer" is material for purposes of resolution of the question presented, the time for PACE to have raised this distinction has long passed. *See* S. Ct. R. 15.2. PACE's eleventh-hour assertion that its proposal constituted a mere transfer to PIUMPF, rather than complete merger of the Crown hourly plans into PIUMPF, is contradicted by PACE's contemporaneous characterization of its proposal to Crown as a "merger" proposal, *see* note 2, *supra*, and its repeated use of the term "merger" to describe its proposal in its Brief in Opposition. *See, e.g.*, Counterstatement of Questions Presented, Br. in Opp. at i ("Whether *merger* into a multiemployer pension plan is a method of providing benefit liabilities in terminating a single-employer plan under ERISA.") (emphasis added). Nowhere in its Brief in Opposition did PACE take issue with the characterization, in Crown's petition, of PACE's proposal as a "merger" proposal.

have an individual claim to reversion of excess assets attributable to their contributions. *See* Pet'r Br. at 33–34.

4. PACE also ignores other indicia that ERISA treats merger and termination as distinct concepts. As discussed in Petitioner's Brief at 24–25, distribution of plan assets during termination ends the payment of premiums to the PBGC, *see* 29 U.S.C. § 1307(a), and ends the PGBC's guarantee of benefits so distributed. That is simply not the case with the merger. In merger, insurance premiums continue to be paid to the PBGC, *see* 29 U.S.C. § 1306(a)(3), reflecting the PBGC's continued insurance responsibility for the transferred benefit liabilities. These conflicting requirements for termination and merger cannot be reconciled.

III. The PBGC's Consistent Interpretation of Its Regulations Confirms That Merger Is Not a Means of Termination.

In order to avoid ERISA's textual and structural rejection of its position, PACE claims that the interpretation advanced by Crown and the government contradicts the PBGC's prior practices, and asserts that the government's views are not entitled to deference in this case. Both contentions are flawed: the PBGC's prior practices are wholly consistent with ERISA's rejection of PACE's arguments, and the agency's views are properly entitled to deference.

A. Throughout its brief, PACE relies on PBGC opinion letters that it claims characterize and approve of the transfer of assets to a multiemployer plan as a "permissible method of distributing assets upon plan termination." *See, e.g.*, Resp. Br. at 38–42. PACE misreads the PBGC's prior letters, which in fact reaffirm that merger and termination are separate procedures.

Though the PBGC letters evidence concerns arising when plan modification and termination are conducted in

rapid succession, they in no way suggest that merger constitutes a method of *distributing* assets in satisfaction of 29 U.S.C. § 1341's standard termination requirements. Nor do they suggest that decisions regarding plan modification are governed by fiduciary duty. Rather, the letters consistently characterize the transactions as involving two separate sponsor-level decisions: a decision to modify plan structure by merger, spinoff, or transfer, followed by a decision to terminate a remaining plan.

PBGC Opinion Letter 85-25, which PACE claims is "the one occasion in which the PBGC considered the issue raised in this case," Resp. Br. at 39, actually provides the clearest *rejection* of PACE's argument. In that circumstance, after an employer proposed the termination of its single-employer plan, its union conditioned acceptance of the termination proposal upon the company's willingness to transfer assets and liabilities to a multiemployer pension plan to which the union was a party. Br. in Opp. at 14a. The PBGC described the resulting transaction as "a transfer from a single-employer plan to an ongoing multiemployer plan *followed by* the termination of the single employer plan." *Ibid.* (emphasis added). The textual separation is clear: *first* assets and liabilities would be transferred to the multiemployer plan, and *then* the extant single-employer plan would be terminated through "the plan termination requirements of Title IV of ERISA." *Ibid.* Other opinion letters relied on by PACE evidence the same two-step understanding. *See* PBGC Op. Ltr. 85-11 (Br. in Opp. at 6a–9a) (plan split-up followed by plan termination); PBGC Op. Ltr. 85-21 (Br. in Opp. at 10a–13a) (same). Based on that understanding, the PBGC approved of the two-step transaction.

The PBGC letters acknowledge that in some cases, two step "spin-off/termination" transactions are actually improper attempts to capture a reversion from an ongoing plan without fully complying with ERISA's requirements. In such cases, the termination component of the two-step

transaction is rejected by the PBGC unless the employer purchases annuity contracts securing the benefit liabilities of the *original* plan, rather than just the subpart being terminated—a distinct obligation from § 1341's requirement that the benefit liabilities remaining in the *terminated* plan be distributed to the plan participants. *See* Joint Implementation Guidelines (Br. in Opp. at 3a). The specific letters PACE relies on considered application of this rule to proposed two-part transactions and found that the additional guidelines "[did] not apply." *See, e.g.*, Br. in Opp. at 15a. As the guidelines did not apply, the employer had no obligation to annuitize the entire original plan; it was permitted with the standard termination of the extant portion.

The PBGC letters contain no suggestion that a pre-termination merger/transfer is considered a method of *implementing* the subsequent termination—the distribution of assets pursuant to 29 U.S.C. § 1341(b)(3)(A)(ii). Instead, they establish that such transfers constituted a permissible *restructuring* of the plan, in which benefit liabilities were conveyed into a separate plan *prior* to a standard termination conducted in accordance with Title IV. Such structural decisions, like all other decisions regarding plan amendment or modification, are non-fiduciary plan sponsor functions.

Crown does not dispute that ERISA permitted it to merge its pension plans. Indeed, rather than terminate its individual hourly plans, Crown in fact merged twelve of its pension plans together and then terminated this successor plan pursuant to § 1341(b)(3)(A)(i). Pet'r Br. at 4–5. What Crown does dispute, and what the PBGC letters do not support, is PACE's claim that its merger proposal constituted a *method of implementing* the standard termination of Crown's plans, such that Crown would have had a fiduciary obligation to consider PACE's proposal. The PBGC's position, as expressed in the government's brief and corroborated by its opinion letters and

interpretive regulations, is that merger and termination are independent processes. Therefore, if Crown had accepted PACE's proposal, Crown would have chosen merger *instead* of termination, rather than merger as a means of termination.

B. Crown's argument is further supported by the PBGC's interpretation of 29 C.F.R. § 4041.28(c)(1), which provides that termination can only be effected through annuitization or lump sum payment. *See* Gov't Br. at 21–23. Relying on *Gonzales v. Oregon*, 126 S. Ct. 904 (2006), PACE argues that the PBGC's interpretation of its regulation is not entitled to deference. Resp. Br. at 47–50. However, *Gonzales* has no application here. In *Gonzales*, the Court declined to give deference to the Attorney General's interpretation of a regulation that "parrot[ed]" the words of the statute, explaining that "the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute." 126 S. Ct. at 916.

In this case, in contrast, the relevant question *is* the meaning of the regulation. ERISA clearly requires any alternative method of distributing assets in a termination to be permitted by the PBGC's regulations. *See* 29 U.S.C. § 1341(b)(3)(A)(ii) (alternative method of distribution must be "in accordance with . . . applicable regulations"). Because the critical question is thus the meaning of the PBGC's regulations themselves, deference is appropriate. If the Court had deferred to the executive's informal interpretation in *Gonzales*, it would have permitted the government to evade the limitations that the Court has placed on the executive's interpretation of *statutes*. *See United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (deference to government's interpretation of statute generally appropriate only where interpretation is embodied in formal rulemaking or adjudication). Here, there is no such danger, because the government is invoking def-

erence in order to clarify the meaning of an ambiguity in the PBGC's *regulations*, not an ambiguity in ERISA.

These regulations, as the government has explained, establish that merger is not a valid method of implementing a standard termination. Gov't Br. at 21–23. Indeed, the PBGC has consistently prescribed methods of distribution that would foreclose merger. *See, e.g.*, 29 C.F.R. § 2617.27(c) (1993); 29 C.F.R. §§ 4041.6(a), 4041.27(c) (1996). PACE attempts to undermine the PBGC's arguments by claiming that the PBGC's 1997 amendments to its regulations, which adopted the language currently found at 29 C.F.R. § 4041.28(c)(1), "affirmatively broadened" the provision in a manner inconsistent with the agency's current position. Resp. Br. at 42–43. However, there is no hint in the preamble to either the proposed or final 1997 rule that the regulations were changing the permissible *methods* of distribution. *See* 62 Fed. Reg. 12,508 (Mar. 14, 1997); 62 Fed. Reg. 60,424 (Nov. 7, 1997).

Moreover, the limitations on distribution methods contained in the pre-1997 rule were carried forward in the Form 500 instructions, which were expressly designed to "implement[ ]" the final rule. *See* 62 Fed. Reg. at 60,427 (Nov. 7, 1997); *see also* Chamber Br. at 11–12. These limitations are required by the Internal Revenue Code, which mandates that ERISA plans provide benefits in the form of a joint and survivor annuity unless the participant and his or her spouse elect another form, and allows non-consensual lump sum distributions only when benefits are de minimis. 26 U.S.C. §§ 401(a)(11), 411(a)(11), 417. The PBGC's interpretation therefore accords with its regulations, as neither the pre- nor post-amendment versions of 29 C.F.R. § 4041.28(c)(1) endorse PACE's claim that merger can serve as a method of distributing assets during a standard termination.

CONCLUSION

For the reasons provided above and in ~~Crown~~'s opening brief, this Court should reverse the decision of the Ninth Circuit.

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April 17, 2007

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No. 05-1448

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JEFFREY H. BECK,
Liquidating Trustee of the Estates of
Crown Vantage, Inc. and Crown Paper Company,
Petitioner,

v.

PACE INTERNATIONAL UNION,
EDWARD J. MILLER and JEFFREY D. MACEK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF AND NEW MATTER

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January 17, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

COUNTERSTATEMENT OF QUESTIONS PRESENTED

An employer with conflicting interests as sponsor, trustee, and administrator of its employees' pension plans may decide to terminate the plans. The questions presented are:

1. Whether the employer owes a fiduciary duty under ERISA to consider all options available for providing benefit liabilities in terminating the plans.

2. Whether merger into a multiemployer pension plan is a method of providing benefit liabilities in terminating a single-employer plan under ERISA.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Respondent PACE International Union recently merged with the United Steelworkers of America (USW), AFL-CIO. PACE and USW were and are unincorporated associations.

The full name of the merged entity is United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.

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IN THE

Supreme Court of the United States

No. 05-1448

JEFFREY H. BECK,
Liquidating Trustee of the Estates of
Crown Vantage, Inc. and Crown Paper Company,
Petitioner,

v.

PACE INTERNATIONAL UNION,
EDWARD J. MILLER and JEFFREY D. MACEK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF AND NEW MATTER

ARGUMENT

I. MATTERS NEWLY REVEALED ON DECEMBER 21, 2006 BY PETITIONER AND NOT BRIEFED TO THIS COURT SUGGEST THAT CERTIORARI SHOULD BE DENIED AS UNRIPE.

On December 21, 2006 the Petitioner, Jeffrey H. Beck, filed a motion in the related bankruptcy case that disclosed new matters that could dramatically impact this case and affect its outcome. The Petitioner's motion reveals the receipt

of approximately $1.7 million as proceeds of a settlement between The Hartford Financial Services Group, Inc. and attorneys general of Connecticut and New York. The settlement provides money "directly to the pension plans harmed by the scheme" of "secret kickbacks" to brokers of pension annuities, including the pension annuity of this case. App. 39a. That annuity resulted from the fiduciary breach described in the Connecticut complaint against Hartford. App. 46a, 66a-67a. The Petition defends this annuity but never mentions the wrongdoing of Hartford and the broker. *See* Petition at 7. In bankruptcy court the Petitoner seeks to apply the settlement proceeds to general funds available to certain creditors, rather than to the pension plan. App. 1a.

These new matters implicate counsel's "continuing duty to inform the Court of any development which may conceivably affect the outcome," *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C. J., concurring). Unfortunately, the Petitioner's failure to come forward with the information of the Hartford settlement precludes the possibility of an adequate record upon which to decide whether to grant certiorari.

The bankruptcy court has not yet heard or considered Petitioner Beck's motion, the new matters disclosed in the motion, or Beck's request that the settlement proceeds go to the creditors. On January 10, 2007, Respondents filed an Objection and Request for Hearing on the matter. App. 18a, 37a. Other interested parties, including government agencies, may wish to speak on Beck's motion, which mentions the possible interest of the Internal Revenue Service. App. 4a.

Petitioner Beck has not offered a reason for keeping this information from the Court, the parties, and the interested government agencies throughout the entire briefing period. The Petitioner himself most likely learned of the settlement funds no later than early July 2006, on receiving a letter from a Hartford Insurance entity. *See* App. 6a. The letter informed Petitioner that the Crown Vantage pension plan annuity of

about $85.9 million entitled him to a pro rata share of settlement of more than $1.7 million. *Id.* Beck signed Hartford's release form to obtain the funds on October 6, 2006. App. 17a.

The Petitioner's Reply brief filed August 8, 2006 makes no reference to the new matters of the settlement proceeds, their origins in a scheme that harmed the pension plan, or Petitioner's intentions respecting the proceeds. The Solicitor General too was apparently denied opportunity to address the new matters disclosed, for his brief was filed only on December 22, 2006, the day following the appearance of these new matters in the Petitioner's bankruptcy motion.

The new matters disclosed in Petitioner's motion show a fiduciary failure in selecting between annuity providers, *Waller v. Blue Cross*, 32 F.3d 1337, 1342-1344 (9th Cir. 1994). The bankruptcy court would have viewed the transaction differently in light of the kickback scheme. *See* Petition App. 65. The facts are not developed, and the controversy therefore is not ripe for review. *See Socialist Workers Party v. Gilligan,* 406 U.S. 583, 587-88 (1972) ("extraordinarily skimpy" record lacks the "sort of proved or admitted facts that would enable us to adjudicate this claim"); *Doe v. Bush,* 323 F.3d 133, 139 (1st Cir. 2003) (Fitness "typically involves subsidiary queries concerning finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed.") Respondents are concerned that this Court be presented with an adequate record. Without it, the case should be considered unripe. "The ripeness doctrine is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction,'" *National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 808, (2003), quoting *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57, n. 18 (1993). The Court may consider ripeness on its own motion "even in a case raising

only prudential concerns." *Id.* (citing *Regional Rail Reorganization Act Cases,* 419 U.S. *id.* 102, 138 (1974).

In the absence of a clear factual record of this new claim of Petitioner to assets derived from the pension fund, any decision here might easily miss the mark and fail in guiding the lower courts and government agencies.

Although the annuity was purchased using pension assets, App. 3a, Petitioner Beck now claims the settlement sum as plan *sponsor* and for bankruptcy creditors, rather than as an ERISA fiduciary. *Id.* The Petitioner's claim to the money thus presents an issue of application of ERISA fiduciary duties to one who is a plan trustee or administrator and at the same time the plan's sponsor—an issue at the heart of this case.

Such facts as are available appear below and in the Appendix, which contains:

A. Liquidating Trustee's Motion To Apply Settlement Proceeds As General Funds, filed December 21, 2006 in Bankruptcy Court;

B. Objection to Motion To Apply Settlement Proceeds As General Funds; Request for Hearing, filed January 10, 2007 in Bankruptcy Court;

C. Press Release of State of Connecticut Attorney General's Office, describing settlement reached with Hartford, dated May 10, 2006;

D. Excerpts of Complaint against Hartford filed by the Connecticut Attorney General;

E. Excerpts of Agreement with States' Attorneys General, dated May 10, 2006.

A. The Newly Disclosed Hartford Settlement Presents Facts that Could Affect the Outcome of this Case.

The bad conduct of Hartford and the broker revealed in the bankruptcy case make the record inadequate and the case unripe. The taint of fiduciary breach in the process of *selecting* the Hartford annunity calls for inquiry to prevent an unjust result. While the facts of this new matter have only begun to come out, it is clear that their effects could potentially be dispositive of issues here.

For example, it could well turn out that pension assets were lost to the Hartford kickback scheme because Crown Vantage pension trustees, acting in haste, failed to exercise the care of an ERISA fiduciary as they relied on the broker and Hartford. In that event, which the existing record does not contradict, the Petitioner's arguments that termination decisions are sponsor functions would be largely irrelevant.

A different example may further illustrate the problem of unripeness. If Petitioner Beck were now permitted to keep the Hartford Settlement Funds, the rationale for allowing it could disturb the administration of the "surplus" plan assets held by court order as a remedy for plan participants in this case. Petition App. 74-76. A record below is needed on newly disclosed matters.

Necessary findings below could alter the outcome in a wide variety of ways. If it is found that Petitioner may now accept for the bankruptcy liquidation trust creditors a windfall of $1.7 million from Hartford, on similar principles the bankruptcy trust might be charged with reimbursing the pension fund for previous transfers to Hartford on account of errors and re-calculations (about $1.8 million). App. 21a-22a.

As pension assets went to Hartford for the annuity, the courts below will likely hold the Hartford annuity settlement

proceeds to be plan assets as well. As the plan fiduciary, Beck must place these proceeds in the pension account.

Effective review by the Court requires an adequate record. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). The Petitioner's failure to bring these important new matters to this Court's attention has unfairly precluded the timely development of that record.

B. Petitioner's Claim for Settlement Money Conflicts with His ERISA Fiduciary Duties.

Petitioner Beck's motion in the bankruptcy case, in seeking approval to "apply" the settlement proceeds as general funds, not pension assets, appears to flout the intention of the Hartford Settlement. While Beck's motion would make the funds available only to certain bankruptcy creditors, the official web site of the Connecticut Attorney General says otherwise:

> The settlement will provide $16.1 million **directly to the pension plans harmed by the scheme** and $1.95 million in penalties each to Connecticut and New York. Under these agreements, The Hartford secretly paid brokers millions of dollars in exchange for brokers steering pension plan purchases of annuities, and providing inside information on competitive bidding.

App. 39a (emphasis supplied).

The Complaint that led to the Hartford settlement describes the broker for the annuity in this case, Dietrich & Associates, as an ERISA fiduciary, App. 63a, required "to act solely for the plan it is representing and not for itself or some third party." App. 64a, ¶ 98. But Hartford "saddled the brokers with a conflict of interest that induced the brokers to breach their fiduciary duty," App. 66a, by secretly promoting Hartford, App. 46a. All of this would have affected the trial in this case, and it will also affect the outcome in this Court, which is asked to rule on the scope of ERISA fiduciary duties during plan termination. The settlement proceeds' origin in

ERISA fiduciary breach is the sort of information that would assist this Court's review. The settlement was intended to directly benefit "pension plans harmed by the scheme," as explained by the Connecticut Attorney General. App. 39a. Yet Beck contends in bankruptcy court that the pension plan "does not have any interest in such funds," App. 4a.

Beck's position that the Settlement should go to creditors, conflicts with his duties as pension plan fiduciary. His secrecy in the matter during briefing here likewise favors the creditors' interests.

This matter is not ripe for this Court's review in the absence of a reliable factual record of Beck's participation in the Hartford Settlement and of the decision by the Crown Vantage Board to purchase the annuity subject to Hartford's kickback scheme. Beck's motion in the bankruptcy case must be decided and no date has been set for hearing.

Respondents desire to develop facts in discovery and otherwise, as indicated in their Objection filed January 10, 2007 in bankruptcy court. App. 18a-36a.

II. THE BRIEF OF THE UNITED STATES AS *AMICUS CURIAE* FAILS TO SHOW THAT CERTIORARI IS WARRANTED.

The United States did not join in the Petitioner's key arguments. The Amicus Brief refrains from joining the Petitioner's insistence on a split in the circuits as ground for certiorari, speaking instead of "tension" with other courts of appeal. Br. of *amicus curiae*, United States at 17. In doing so, the United States incorrectly portrays the Ninth Circuit's decision in this case as departing from the rule that a decision to terminate a pension plan is a sponsor function not subject to ERISA fiduciary rules. That is not an issue in this case.

The implicit recognition that no split of authority exists among the circuits sets the Amicus Brief against the Petitioner's position. Viewed through the lens of this litigation as it progressed through the courts below, this is not surprising, as neither the Pension Benefit Guarantee Corporation nor the Department of Labor objected to the result at trial. Both agencies monitored the case from the beginning. A PBGC attorney testified at trial that he never stated any reservations about the plan merger proposed by PIUMPF. Petition App. 62.

There is no indication that ERISA enforcement has been or will be weakened in the Ninth Circuit. The speculation that employer reversions will be discouraged, Br. of *amicus curiae* United States at 17, is unconvincing because the decision below does not require pension mergers or prohibit reversions. Merger with multi-employer plans tends to reduce pension failures, because of the ability of multi-employer plans to spread risk and reduce the exposure to problems of a particular employer.

The view of PBGC that annuity purchase should be preferred over methods that "otherwise provide all benefit liabilities," 29 U.S.C. § 1341(b)(3)(A), Br. of *amicus curiae*, United States at 13, does not hold up under the history of this case. While annuities from Hartford appeared to be safe, we now know Hartford overcharged and paid secret kickbacks. App. 41a. Fiduciary scrutiny could have protected the plan. Benefit liabilities were miscalculated in ways large and small, entailing substantial administrative and legal effort, as well as a massive transfer of $1.8 million in additional pension assets to Hartford to cover benefits. Had the trial court allowed the reversion Petitioner seeks, those assets would not have been available.

There is wisdom in the ERISA statutory choice of alternative methods for providing for all benefit liabilities. PBGC's argument based on interpreting regulations about distribution is out of place in a discussion of merger. In any case, there

was no merger and the Ninth Circuit did not hold that merger was either required or forbidden.

The recent disclosure of the Hartford Settlement reveals yet another shocking problem with the annuity: secret kickbacks to specializing brokers. The Petitioner's attempt to claim the settlement sum, while withholding it from view for months during the briefing here, shows the wisdom of the statute in allowing methods other than annuity purchase.

The Ninth Circuit's stress on ERISA fiduciary obligations is clearly the touchstone and one that is not controversial in this Court.

CONCLUSION

For the reasons stated above and in the Respondents' Brief in Opposition, the Petition for Certiorari should be denied.

Respectfully submitted,

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January 17, 2007

APPENDIX

APPENDIX A

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

Case No. 00-41584 N

In re CROWN VANTAGE, INC., CROWN PAPER, INC.,
Debtors,

Chapter 11
(Jointly Administered)
Employer I.D. # 54-1752384

Place: Courtroom of the Hon. Randall J. Newsome
Date and Time: To Be Determined

MOTION TO APPLY SETTLEMENT PROCEEDS AS GENERAL FUNDS

Jeffrey H. Beck (the "Trustee"), Trustee of the Crown Paper Liquidating Trust (the "Crown Liquidating Trust"), hereby moves this Court to authorize the Crown Liquidating Trust to apply and use the proceeds in the amount of One Million Seven Hundred Fourteen Thousand Seventy-Nine Dollars and Thirty-Eight Cents ($1,714,079.38), received from Hartford Financial Services Group ("Hartford") pursuant to the settlement documents attached to this Motion, as general assets of the Crown Paper Liquidating Trust and as Recovery Proceeds as that term is defined in the Crown Liquidating Plan of Reorganization.

I. Bankruptcy Proceedings

1. On March 15, 2000 (the "Petition Date"), Crown Vantage, Inc. and Crown Paper, Inc. (collectively, the "Debtors") each filed voluntary petitions for relief under chapter 11 of Title 11 of the United States Code. By order dated March 16, 2000, the Debtors' cases were ordered to be jointly administrated under Case No. 00-41584 N.

2. By order dated November 19, 2001, this Court confirmed the Debtors' Joint Liquidating Plan of Reorganization (the "Crown Liquidating Plan of Reorganization"), which provided for the creation of the Crown Liquidating Trust and appointed Jeffery H. Beck to serve as Liquidating Trustee of the Crown Liquidating Trust.

3. Pursuant to § 7.3 of the Crown Liquidating Plan of Reorganization, upon its Effective Date, all of the Debtors' assets vested automatically in and were transferred to the Crown Liquidating Trust and constitute Liquidating Trust assets. Cash constituting the proceeds from the disposition of Liquidating Trust Assets (other than the proceeds from the disposition of Retained Assets) are defined by the Crown Liquidating Plan of Reorganization as "Recovery Proceeds."

4. The Crown Liquidating Plan of Reorganization became effective on or about March 1, 2002, and the Crown Paper Liquidating Trust Agreement (the "Liquidating Trust Agreement") was executed, dated, and became effective, as of March 1, 2002.

II. Hartford Settlement

5. On May 10, 2006, Hartford entered into a settlement agreement (the "Hartford Agreement") with the Attorney's General of Connecticut and New York concerning Hartford's use of expense reimbursement agreements in its terminal/maturity funding group annuity line of business. As part of the Hartford Agreement, Hartford paid 16.1 million dollars into a fund for distribution to certain eligible plan sponsors

that purchased terminal/maturity funding group annuities from Hartford between January 1, 1998 and December 31, 2004. Such an annuity was purchased for the Crown Vantage, Inc. Pension Plan No. 7 ("Pension Plan No. 7").

6. Hartford's records indicated that the Trustee is an eligible customer and entitled to receive a portion of the fund upon tendering a release in the appropriate form. Attached to this notice as Exhibit "1" is the correspondence from Hartford to the Trustee, together with the form of release and a notice of settlement information.

7. The Trustee procured the unanimous consent of the Trust Committee of the Crown Liquidating Trust to accept the funds and, on October 6, 2006, executed Hartford's form of release that was delivered under the cover of a letter of October 17, 2006. A copy of the transmittal letter and executed release are attached as Exhibit "2."

8. On November 22, 2006, the Trustee received from Hartford the sum of One Million Seven Hundred Fourteen Thousand Seventy-Nine Dollars and Thirty-Eight Cents ($1,714,079.38, the "Hartford Funds").

9. As indicated in the attached documents, the Hartford Funds are the proceeds of a settlement between Hartford and the Attorney's General of Connecticut and New York and was paid to the Trustee as successor to Crown Paper Company as sponsor of Pension Plan No. 7.

10. The payment was not derived from the amount of assets in the Pension Plan No. 7 or any other financial figure directly related the assets in Pension Plan No. 7; rather it was calculated by Hartford using a formula in the Hartford Agreement involving the sale of annuities where, at the time of the sale, a production based incentive agreement was in place and resulted in either a payment to a broker or consultant, or other related criteria.

11. Hartford has indicated to counsel for the Liquidating Trust that it considers the settlement to involve claims of

the Plan Sponsors, not of the Pension Plans themselves and, accordingly, that Hartford would not pay any funds to retirement plans; rather it would pay only to plan sponsors.

12. Based upon the foregoing, the Trustee believes that the Hartford Funds are cash proceeds from the disposition of the Trustee's right of recovery under a settlement between Hartford and Crown as sponsor of Pension Plan No. 7 and, as such, are general assets of the Liquidating Trust and Recovery Proceeds.

13. Under the terms of the Crown Liquidating Plan of Reorganization, the Pre-Petition Lenders holding Class 2 Claims are entitled to participate in their appropriate share of such Recovery Proceeds.

14. Pension Plan No. 7 is the subject of litigation regarding which the United States Supreme Court is entertaining a writ of certiorari filed on behalf of Crown on May 10, 2006.

15. Because of the terms of the agreement under which Hartford made its payment to the Trustee, the terms of Crown Liquidating Plan of Reorganization and Hartford's indication that it would not pay any funds to a qualified retirement plan, the Trustee believes that the Hartford Funds are general assets of the Liquidating Trust and are Recovery Proceeds. The Trustee further believes that Pension Plan No. 7 does not have any interest in such funds. However, the parties to the pending litigation concerning Pension Plan No. 7, the Internal Revenue Service and/or other parties might have an objection to the treatment of the Hartford Funds as such general assets. Thus, in the interests of full and complete disclosure and in an abundance of caution, the Trustee believes that such parties and all parties entitled to receive notices in the Crown cases should be given notice of the receipt of the Hartford Funds and the opportunity to object to this request that the Court approve the treatment of such Hartford Funds as general assets and Recovery Proceeds of the Liquidating Trust.

16. Based upon the agreements and documents under which the Hartford Funds were received by the Liquidating Trust, the Trustee requests that this Court determine that the Settlement Funds are general assets of the Liquidating Trust, that they are Recovery Proceeds and that they may be used by the Trustee pursuant to the terms of the Crown Liquidating Plan of Reorganization.

17. In the event no objection to the Trustee's application of the Settlement Funds is received by the date set in the notice of this motion, the Trustee respectfully requests that this Court enter its Order confirming the Trustee's proposed application of the Hartford Funds.

18. In the event any written objections are filed and served on the Trustee within the time period set in the notice of this motion, the Trustee requests that this Court set a hearing at which argument upon such objections may be heard.

WHEREFORE, the Trustee respectfully requests that the Court consider and grant this Motion and authorize the Trust to apply and use the Hartford Funds as general assets and Recovery Proceeds of the Crown Paper Liquidating Trust as defined by the Crown Liquidating Plan of Reorganization

DATED this 21st day of December 2006.

Respectfully submitted,

BILZIN SUMBERG BAENA PRICE
& AXELROD LLP

By:/s/ David W. Trench
David W. Trench (admitted pro hac vice)

and

BIALSON, BERGEN & SCHWAB

By: /s/ Kenneth T. Law
Kenneth T. Law

Attorneys for Jeffrey H. Beck, the Liquidating Trustee of the Crown Paper Liquidating Trust

In re Crown Vantage, Inc.
In re Crown Paper Co.

Case No. 00-41584 N (Jointly Administered)

EXHIBIT 1

TO

MOTION TO APPLY SETTLEMENT PROCEEDS AS GENERAL FUNDS

Jeffrey H. Beck, TTEE [Logo]
Crown Paper Co.
225 NE Mizner Blvd. Suite 780
Boca Raton, FL 33432

July 10, 2006

Dear Mr. Beck,

On May 10, 2006, The Hartford Financial Services Group ("Hartford") entered into a settlement agreement (the "Agreement") with the Connecticut and New York Attorneys General concerning Hartford's use of expense reimbursement agreements in its terminal/maturity funding group annuity line of business. As a part of the Agreement, Hartford will pay $16.1 million into a fund (the "Fund") for distribution to certain eligible plan sponsors that purchased terminal/maturity funding group annuities from Hartford between January 1, 1998 and December 31, 2004 ("Eligible Customers").

Our records indicate that you are an Eligible Customer. You are therefore entitled to receive a portion of the Fund, after first tendering a release in the form enclosed.

Specifically, your purchase of group annuity contract(s) GA 20341 for which you paid $85,924,700.00 in premium,

entitles you to receive at least $1,714,079.38 from the Fund. This amount may increase if there is less than full participation in the Fund by other Eligible Customers.

If you wish to participate in the Fund, you must sign a release in the form enclosed and return it before November 7, 2006. If you wish to decline participation in the Fund, no further action on your part is necessary.

Enclosed for your review, please find an explanation of The Hartford's settlement agreement with the Connecticut and New York Attorneys General. A copy of the Agreement is available on The Hartford's website at www.thehartford.com. Additional information is also available on the Connecticut Attorney General's website (http://www.ct.gov/ag/cwp/view.asp?A=2095&Q=305408) and on the New York Attorney General's website (http://www.oag.state.ny.us/press/2006/may/may10a_06.html). You may direct any additional questions that you may have regarding your eligibility to participate in the Fund, or the amount you are entitled to receive, to me at the contact information below.

Sincerely,

Ronald S. Apter, Esq.
Vice President, Assistant General Counsel and Deputy
Director of Compliance
The Hartford Financial Services Group, Inc.
860-547-2311
Ronald.Apter@thehartford.com

RELEASE

This RELEASE (the "Release") is executed this __ day of __, 2006 by RELEASOR (defined below) in favor of RELEASEE (defined below).

DEFINITIONS

"RELEASOR" refers to Crown Vantage, Inc. and any of its affiliates, subsidiaries, associates, general or limited partners or partnerships, predecessors, successors, or assigns, including, without limitation, any of their respective present or former officers, directors, trustees, employees, agents, attorneys, representatives and shareholders, affiliates, associates, general or limited partners or partnerships, heirs, executors, administrators, predecessors, successors, assigns or insurers acting on behalf of RELEASOR.

"RELEASEE" refers to The Hartford Financial Services Group, Inc. and any of its subsidiaries, affiliates, associates, general or limited partners or partnerships, predecessors, successors, or assigns, including, without limitation, any of their respective present or former officers, directors, trustees, employees, agents, attorneys, representatives and shareholders, affiliates, associates, general or limited partners or partnerships, heirs, executors, administrators, predecessors, successors, assigns or Insurers (collectively, "Hartford").

"AGREEMENT" refers to a certain agreement between Hartford and the Attorney General of the State of Connecticut ("CTAG") and the Attorney General of the State of New York ("NYAG") dated May 10, 2006, relating to an action commenced against Hartford by CTAG dated May 10, 2006, captioned "State of Connecticut against The Hartford Financial Services Group, Inc. and Hartford Life, Inc., and an investigation by CTAG relating to same (collectively, the "Connecticut Complaint"); and an action commenced against Hartford by NYAG dated May 10, 2006, captioned "The People of the State of New York against The Hartford

Financial Services Group, Inc. and Hartford Life, Inc.," and an investigation by NYAG relating to same (collectively, the "New York Complaint").

RELEASE

1. In consideration for the total payment of $1,714,079.38. in accordance with the terms of the AGREEMENT, RELEASOR does hereby fully release, waive and forever discharge RELEASEE from any and all claims, demands, debts, rights, causes of action or liabilities whatsoever, including known and unknown claims, in law, equity or otherwise, whether under state, federal or foreign statutory or common law, and whether possessed or asserted directly, indirectly, derivatively, representatively or in any other capacity (collectively, "Claims", to the extent any such Claims are based upon, arise out of or relate to, in whole or in part, any of the allegations, acts, omissions, transactions, events, or matters discussed in the AGREEMENT; in the Connecticut or New York Complaints, or that are the subject of the Attorneys General's investigations (as that term is defined in the AGREEMENT), and occurring up to the date of the AGREEMENT.

2. In the event that the total payment referred to in paragraph 1 is not made for any reason, then this RELEASE shall be deemed null and void, provided that any payments received by RELEASOR shall be credited to Hartford in connection with any Claims that RELEASOR may assert against Hartford; or that are asserted on behalf of RELEASOR or by a class of which RELEASOR is a member, against Hartford.

3. This RELEASE may not be changed orally and shall be governed by and interpreted in accordance with the laws of the State of Connecticut, without regard to conflict of law principles, except to the extent that federal law requires that federal law governs. Any disputes arising out of or related to

this RELEASE shall be subject to the exclusive jurisdiction of the superior court for the judicial district of Hartford or, to the extent federal jurisdiction exists, the United States District Court for the District of Connecticut.

4. RELEASOR represents and warrants that the Claims have not been sold, assigned or hypothecated in whole or in part.

Dated: _____

RELEASOR: _____

By: _____

Print Name: _____

Title: _____

An Agreement between the Attorney General of the State of Connecticut, the Attorney General of the State of New York ("The Attorneys General") and The Hartford Financial Services Group, Inc. and Hartford Life, Inc. ("The Hartford")

NOTICE OF SETTLEMENT INFORMATION

1. WHAT IS THIS SETTLEMENT ABOUT?

The Attorneys General conducted an investigation (the "investigation") of The Hartford's practices in the marketing, sale or placement of terminal and maturity funding single premium group annuity contracts to pension plan sponsors. These products primarily involve the use of annuities from The Hartford to satisfy all or a portion of a terminating pension plan's liabilities to its employees. The Attorneys General alleged that The Hartford unlawfully:

a. Attempted to steer terminal and maturity funding group annuity business to The Hartford by offering expense reimbursement payments and incen-

tive compensation to certain brokers that specialized in the placement of terminal and maturity funding group annunities; and

b. Withheld information regarding the full amount of compensation paid to certain brokers that specialized in the placement of terminal and maturity funding group annuities.

On May 10, 2006, without either admitting or denying the Attorneys General's allegations, The Hartford and the Attorneys General entered into a settlement agreement (the "Agreement"). In resolving the Investigation, The Hartford acknowledged that it disclosed to plan sponsors the amount of standard commission, but not additional incentive compensation, it paid to brokers in connection with the sale of terminal and maturity funding group annuities. The Hartford voluntarily eliminated all incentive compensation arrangements with terminal and maturity funding brokers in 2004.

2. WHO IS INCLUDED?

The Agreement provides that "Eligible Customers" are entitled to receive monetary relief from The Hartford. Eligible Customers are those pension plan sponsors that:

a. Purchased Hartford's terminal and maturity funding group annuities during the period from January 1, 1998 through December 31, 2004;

b. Used either Brentwood Asset Advisors, LLC, or USI Consulting Group, or Dietrich & Associates, or BCG Terminal Funding Company, or those brokers' or consultants' predecessors, as their broker or consultant, and

c. At the time of the sale, the broker or consultant had an expense reimbursement or other production-based incentive agreement, including but not

limited to a consulting agreement or marketing allowance agreement, with the Hartford and (i) the sale resulted in a payment to the broker or consultant pursuant to the expense reimbursement or other production-based incentive agreement, or (ii) an amount reflecting the payment for an expense reimbursement or other production-based incentive agreement was added to the premium but not otherwise paid to the broker or consultant or (iii) the sale was credited toward achieving a threshold to obtain such payment under such an agreement.

3. WHAT ARE THE BENEFITS OF THE SETTLEMENT?

The Agreement provides the following monetary relief to Eligible Customers:

a. The Hartford agrees to pay $16.1 million into a settlement fund (the "Fund").

b. Eligible Customers that elect to participate in the Fund will receive a pro rata share of the Fund. Each Eligible Customer's pro rata share is determined by dividing that Eligible Customer's total paid premium for Eligible Annuities by the total paid premium for all Eligible Annuities, and then by applying that ratio to the total amount in the Fund.

c. Should any Eligible Customer decline to participate in the Fund, the amount that that customer was eligible to receive may be used by The Hartford in limited circumstances to satisfy any pending or other claims asserted by non-participating customers relating to the Attorneys General's allegations.

d. Should any money remain in the Fund as of January 6, 2007, any such funds will be distributed, on a pro rata basis, among those Eligible Customers that have elected to participate in the Fund.

4. HOW DO I RECEIVE PAYMENT?

Eligible Customers who chose to participate in the Fund must sign a release in the form enclosed and return it to The Hartford before November 7, 2006. Distributions from the Fund will be made to participating Eligible Customers on or about November 22, 2006.

In re Crown Vantage, Inc.
In re Crown Paper Co.

Case No. 00-41584 N (Jointly Administered)

EXHIBIT 2

TO

MOTION TO APPLY SETTLEMENT PROCEEDS AS GENERAL FUNDS

McDermott
Will& Emery
Boston Brussels Chicago
Dosseldorf London Los Angeles
Miami Munich New York Orange
County Rome San Diego Silicon
Valley Washington, D.C.

David E. Rogers
Attorney at Law
drogers@mwe.com
202.756.8307

October 17, 2006

BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Lorraine Szymkowicz
Institutional Investment Products
Hartford Life Insurance Companies
200 Hopmeadow Street C1-E
Simsbury, CT 06089

Re: Hartford Settlement Release Form
GA #20341

Dear Ms. Szymkowicz:

On behalf of Jeffrey H. Beck, Trustee to the Crown Paper Liquidating Trust, please find enclosed the release form necessary to participate in the settlement fund.

Please do not hesitate to contact me should you have any questions regarding this matter.

Sincerely,

/s/ David E. Rogers
DAVID E. ROGERS

cc: Jeffrey H. Beck

RELEASE

This RELEASE (the "Release") is executed this 6 day of October, 2006 by RELEASOR (defined below) in favor of RELEASEE (defined below).

DEFINITIONS

"RELEASOR" refers to Crown Vantage, Inc. and any of its affiliates, subsidiaries, associates, general or limited partners or partnerships, predecessors, successors, or assigns, including, without limitation, any of their respective present or former officers, directors, trustees, employees, agents, attorneys, representatives and shareholders, affiliates, associates, general or limited partners or partnerships, heirs, executors, administrators, predecessors, successors, assigns a insurers acting on behalf of RELEASOR.

"RELEASEE" refers to The Hartford Financial Services Group, Inc. and any of its subsidiaries, affiliates, associates, general or limited partners or partnerships, predecessors, successors, or assigns, including, without limitation, any of their respective present or former officers, directors, trustees, employees, agents, attorneys, representatives and shareholders, affiliates, associates, general or limited partners or partnerships, heirs, executors, administrators, predecessors, successors, assigns or insurers (collectively, "Hartford").

"AGREEMENT" refers to a certain agreement between Hartford and the Attorney General of the State of Connecticut ("CTAG") and the Attorney General of the State of New

York ("NYAG") dated May 10, 2006, relating to an action commenced against Hartford by CTAG dated May 10, 2006, captioned "State of Connecticut against The Hartford Financial Services Group, Inc. and Hartford Life, Inc., and an Investigation by CTAG relating to same (collectively, the "Connecticut Complaint"); and an action commenced against Hartford by NYAG dated May 10, 2006, captioned "The People of the State of New York against The Hartford Financial Services Group, Inc. and Hartford Life, Inc.," and an Investigation by NYAG relating to same (collectively, the "New York Complaint").

RELEASE

1. In consideration for the total payment of $1,714,079.38 in accordance with the terms of the AGREEMENT, RELEASOR does hereby fully release, waive and forever discharge RELEASEE from any and all claims, demands, debts, rights. causes of action or liabilities whatsoever, including known and unknown claims, in law, equity or otherwise, whether under state, federal or foreign statutory or common law, and whether possessed or asserted directly, indirectly, derivatively, representatively or in any other capacity (collectively, "Claims"), to the extent any such Claims are based upon, arise out of or relate to, in whole or in part, any of the allegations, acts, omissions, transactions, events, or matters discussed in the AGREEMENT, in the Connecticut or New York Complaints, or that are the subject of the Attorneys General's Investigations (as that term is defined in the AGREEMENT), and occurring up to the date of the AGREEMENT.

2. In the event that the total payment referred to in paragraph 1 is not made for any reason, then this RELEASE shall be deemed null and void, provided that any payments received by RELEASOR shall be credited to Hartford in connection with any Claims that RELEASOR may assert against Hartford; or that are asserted on behalf of RE-

LEASOR or by a class of which RELEASOR is a member, against Hartford.

3. This RELEASE may not be changed orally and shall be governed by and interpreted in accordance with the laws of the State of Connecticut without regard to conflict of taw principles, except to the extent that federal law requires that federal law governs. Any disputes arising out of or related to this RELEASE shall be subject to the exclusive jurisdiction of the superior court for the judicial district of Hartford or, to the extent federal jurisdiction exists, the United States District Court for the District of Connecticut.

4. RELEASOR represents and warrants that the Claims have not been sold, assigned or hypothecated in whole or in part.

Dated: October 6, 2006

RELEASOR: Crown Paper Liquidating Trust, as successor to Crown Paper Company and Crown Vantage, Inc.

By: Jeffrey H. Beck, Trustee

Print Name: Jeffrey H. Beck, Trustee

Title: Trustee

APPENDIX B

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

No. 00-41584N

In re CROWN VANTAGE, INC., CROWN PAPER, INC.,
Debtors,

Chapter 11
Jointly Administered
Employer I.D. No. 54-1752384

Date and time to be determined
Place: Courtroom of Hon. Randall J. Newsome

OBJECTION TO MOTION TO APPLY SETTLEMENT PROCEEDS AS GENERAL FUNDS; REQUEST FOR HEARING

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I. INTRODUCTION

1. This Objection and Request for Hearing[1] is hereby made in response to the Motion to Apply Settlement Proceeds as General Funds brought by Jeffrey H. Beck, Liquidating Trustee of the Crown Paper Liquidating Trust. This Objection and Request for Hearing is made by the Plaintiffs in the related Adversary Proceeding No. 01-4375-AN, which is subject to a pending petition for certiorari in the Supreme Court that involves certain issues presented by the instant motion. These Objectors, PACE International Union[2] and two individual members and pension plan participants,[3] prevailed in the Ninth Circuit, which affirmed the holding of this Court that "surplus" pension plan assets could not revert to the estate under the facts of that case, but instead must go to participants.[4] The same reasoning applies to the $1,714,079.38 received from Hartford Insurance Company based on the pension plan's purchase of annuities while victim of Hartford's scheme of "secret kickbacks" to brokers in the pension annuity business. The Motion should be denied, and the sum received paid over to the Crown Vantage pension account forthwith. This sum will help replenish the

---

[1] Together with the concurrently filed Declaration of Christian L. Raisner in Support of Objection to Motion to Apply Settlement Proceeds As General Funds and exhibits thereto.

[2] PACE International Union recently merged with the United Steelworkers of America and other industrial unions. The merged union is called "USW." For consistency in this bankruptcy case, however, we will continue to refer to "PACE" or "the Union."

[3] As captioned in Adversary No. 01-4375-AN, Plaintiffs are PACE International Union on behalf of members and former member participants in pension plans sponsored by the Debtors; Edward J, Miller, Jeffrey D. Macek on behalf of themselves and others similarly situated. All of those Plaintiffs are referred to collectively herein as "PACE."

[4] *Beck v. PACE Intl. Union*, 427 F.3d 668 (9th Cir. 2005); *see also Beck v. PACE Intl. Union*, 146 Fed. Appx. 917.

$1.8+ million transferred from the pension account to Hartford to cover pension liabilities that the annuity contracts failed to include. [Docket 1656] The facts and law found by this Court have been affirmed by the Ninth Circuit and identify the sums transferred originally to Hartford were plan assets. *Beck v. PACE International Union*, 427 F.3d 668 (9th Cir. 2005). Recovery based on those assets consists of plan assets as well.

2. The settlement sum at issue of approximately $1.7 million comes from a settlement of suits brought by attorneys general for Connecticut and New York alleging "secret kickbacks" by Hartford Insurance Company for the steering of annuity business to them. Among the annuity business steered to Hartford was some $85 million in pension assets of the merged Crown Vantage retirement plan. The settlement sum is the share accorded the $85 million, based on a formula to distribute $16.1 million "directly to the pension plans harmed by the scheme," Decl. Raisner Exhibit C (Attorney General website).

3. This Court held in related Adversary Proceeding No. 01-4375 AN, on December 11, 2001, that surplus pension assets would not revert to the plan sponsor, and entered an order in February 2002 establishing a remedy negotiated by the parties to distribute of the surplus to participants after meeting certain ERISA plan termination requirements. On November 5, 2003, Crown was granted leave to pay an additional annuity premium to Hartford in order to include pension benefits not originally covered by the annuity contract. This reduced the remaining surplus by more than $1.8 million, substantially reducing amounts available to return contributions and to pay new benefits to participants. Beck is the successor to the Crown Vantage Board of Directors as both sponsor and plan administrator of the Crown Vantage Pension Plan. The entire amount of the funds used to purchase the annuities from Hartford consisted of pension

assets. The settlement proceeds should be returned to the pension plan, which is the sole source of the $85 million leading to the settlement recovery.

4. It appears that Beck never informed the Supreme Court of the information disclosed in this motion. As a result, no briefing has occurred on the issues on the petition for certiorari. No record appears that any party or any government agency was informed. Beck had plenty of time to disclose these new developments which he knew about well before filing his reply in the Supreme Court on August 8, 2006. *See* Decl. Raisner Exhibit A. On October 2, 2006, the Solicitor General was invited to file a brief expressing the views of the United States. His brief, filed December 22, 2006, the day after this Motion was filed. The Department of Labor and the Pension Benefit Guaranty Corporation are on that brief, which also did not address this issues presented in the motion. *See* Decl. Raisner ¶ 3.

5. PACE therefore objects to Beck's Motion and requests a hearing. However, Beck's petition for certiorari pending in the Supreme Court, Docket No. 05-1448, involves issues that control this matter to a large extent. Unless and until the Supreme Court or an appellate court orders otherwise, surplus pension assets in this case cannot go to Beck or the estate or be applied as general funds. To permit the Hartford settlement proceeds to be applied as general funds would contradict the Ninth Circuit's opinion that Beck has asked the Supreme Court to review.

II. THE HARTFORD SETTLEMENT FUND

6. On July 10, 2006 an officer of The Hartford Financial Services Group, Inc. wrote to Beck describing a settlement reached with attorneys general of Connecticut and New York. The letter stated:

> Specifically, your purchase of group annuity contract(s) GA 20341 for which you paid $85,924,700.00 in pre-

> mium, entitles you to receive at least $1,714,079.38 from the [settlement] Fund.

Exhibit 1 to Beck's Motion to Apply Proceeds as General Funds. The money used to purchase the annuities consisted of pension plan assets drawn from pension fund accounts. "Crown signed an agreement to deposit over 84 million dollars in plan assets with Hartford." *Transcript of Proceedings, December 11, 2001, Adversary No. 01-4375-AN at 12:8-9*; Decl. Raisner Exhibit F at 12:8-9.

7. Pension plans were intended to be the direct beneficiaries of the Hartford Settlement. The official website of the Connecticut Attorney General states:

> The settlement will provide $16.1 million directly to the pension plans harmed by the scheme and $1.95 million in penalties each to Connecticut and New York. Under these agreements, The Hartford secretly paid brokers millions of dollars in exchange for brokers steering pension plan purchases of annuities, and providing inside information on competitive bidding.

Decl. Raisner Exhibit C (emphasis supplied).

8. The Settlement Agreement dated May 10, 2006, between Hartford and the Attorneys General describes the "Terminal/Maturity Funding Group Annuity Fund," set up "to be paid to Hartford's pension plan customers that purchased Hartford's Terminal/Maturity Funding Group Annuity(ies)" during 1998-2004, and using specified brokers, including Dietrich & Associates, the broker who recommended Hartford to the Crown Vantage Board of Trustees. See Decl. Raisner Exhibit E ¶ 1 at pp. 2-3.

9. The amount of settlement funds to be paid to particular "Eligible Customers" was based on calculations expressly taking into account the amount of pension assets used to purchase annuities, in particular:

> . . . (iii) the amount of the Eligible Customer paid in premiums for each Eligible Annuity; and (iv) the amount each Eligible Customer is eligible to receive from the Terminal/Maturity Funding Group Annuity Fund, which shall equal each Eligible Customer's pro rata share of the Terminal/Maturity Funding Group Annuity Fund **as calculated by the ratio of the Eligible Customer's total paid premium for Eligible Annuity(ies), divided by the total paid premium for all Eligible Annuities. . . .**

Decl. Raisner Exhibit E ¶ 3 at p. 4 (emphasis supplied).

10. Beck did not disclose the Hartford Settlement until filing the instant Motion December 21, 2006. Only then did he disclose his position that the Crown Vantage Pension Plan "does not have any interest in such funds." Beck Motion ¶ 15 at 4:18. The timing of Beck's revelation prevented briefing on this matter in the Supreme Court, where it is plainly germane to the pending petition for certiorari, which concerns, among other things, the application of ERISA fiduciary standards to plan sponsors in relation to plan assets in termination and other situations. See Decl. Raisner Exhibit B-1 at i-iv, B-2 at (i)-iv in Supreme Court. The facts concerning the Hartford settlement payout substantially impact the issues presented on the petition for certiorari.

III. BACKGROUND OF RELATED ADVERSARY PROCEEDING

11. The related adversary proceeding provided essential background. On November 15, 2001, PACE and two individual participants filed Adversary Proceeding Adversary No. 01-4375-AN and on November 19, 2001, filed their First Amended Complaint. On November 29, 2001, the Court held an all-day hearing on the Plaintiffs' request for a preliminary injunction, which was granted on December 11, 2001. *See* Transcript, Decl. Raisner Exhibit F. On February 4, 2002, at the Court's direction, the parties filed a "Joint Report" con-

taining a stipulation that the Court's Findings of Fact and Conclusions of Law were "final," and suggesting how the surplus assets could be distributed. On February 5, 2002, the Court signed the proposed Order submitted with the Joint Report.

12. On November 5, 2003, the Liquidating Trustee obtained the Court's permission to pay an additional premium to Hartford on the annuity in order to include pension benefits the contract had mistakenly failed to include. Over Plaintiffs' opposition, the Bankruptcy Court permitted defendant to pay the additional premium from pension plan assets. [Docket 1656]

13. In March 2000, Crown filed for Chapter 11 bankruptcy. In August 2001, it was clear that Crown Vantage would soon cease to exist. Crown hired Dietrich & Associates to explore the possibility of purchasing an annuity to cover the benefit liabilities of its pension plans. Dietrich was instructed to find an annuity provider for the ten current plans and for two of the seven frozen plans that were overfunded. Crown cherry-picked the plans to be annuitized, selecting those that could provide a surplus and abandoning the others.

14. At about the time that Crown was hiring Dietrich, a meeting took place between Bob Smith, Regional Vice-Present of PACE, Evan Davis, President and CEO of Crown, and several Crown attorneys. Smith suggested that the PACE Industry Union Management Pension Fund ("PIUMPF") might be willing to take over the Crown pensions, and Crown was interested. PIUMPF sent Crown a detailed proposal, including actuary determination and plan documents. The minutes of the September 26, 2001 meeting of the Crown Board state:

> The Union has offered to take all of the hourly pension plans into PIUMPF, the union multi-employer plan. *This offer will be evaluated in comparison to the annuitization of plans when we receive final bids from the annuity providers*. The final bids are anticipated on October 9, 2001.

Also on September 26, Crown's attorneys asked PIUMPF for certain information, e.g., the latest IRS determination letter, the current investment policy, etc., which PIUMPF sent on October 8.

15. Meanwhile, on October 4, 2001, Crown's attorney promised *in open court* to give PACE notice of any intended action, including a possible merger, and to obtain court approval of any such action.

16. On October 9, Crown received bids of several annuity providers. Meeting that day, Crown's Board of Directors decided to accept the bid of Hartford Life Insurance Co. for approximately $84 million, which would leave about $5 million in the Crown plans. The Crown Board hoped that this sum would revert to Crown Vantage upon the plans' termination.

17. On October 10, without notice to PACE or to the Bankruptcy Court, Crown sent the $84 million to Hartford. This Court noted in its December 11, 2001 Order:

> Thus, as of October 10th, the annuitization of pension plans was a fait accompli, notwithstanding the assurances of notice and Court approval made by counsel for Crown to the Court and counsel for the Union at the October 4th hearing.

18. On October 26, 2001, Crown merged the twelve plans into one and formally decided to terminate it. The Board never examined the documents sent by PIUMPF, and never made a comparison between the PIUMPF plan and annuitization.[5] Dietrich & Associates, whom the Board hired to

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[5] PIUMPF supplied every document requested by Crown, amounting to several hundred pages of material, including plan documents, financial data, and a draft Merger Agreement. On the other hand, Crown never examined or even saw the actual annuity policy to be issued by Hartford, not even a sample annuity policy, before transferring the $84 million.

gather information and give advice about annuities, could have compared the PIUMPF offer to the annuities, but did not do so.

19. The Court found that Crown "gave no serious consideration to the PIUMPF merger proposal." Decl. Raisner Exhibit F 14:1-2. A comparison would have revealed a number of advantages in the PIUMPF proposal. *Id.* at 8. PIUMPF offered a simple, effective method of dispute resolution before a neutral party. Hartford had no system at all. PIUMPF had an established history of increasing benefits and paying bonuses from time to time. Hartford's policy was never to increase benefits. PIUMPF's offer was to accept *all* liabilities of the pension plans. Hartford's offer was to accept only those spelled out in the policy, which were, in fact, less than what had been promised the workers. PIUMPF's offer left no reversion for Crown. Hartford's offer left about $5 million.

20. Crown said it chose Hartford over PIUMPF because PBGC had expressed reservations. In fact, however, the PBGC had *not* expressed any reservations. The PBGC officer in charge of the Crown matter testified that he had not expressed any "reservation" or "concern" about the proposed PIUMPF merger. Decl. Raisner Exhibit F at 13:15-21.

21. As pointed out in the Complaint that led to the Hartford Settlement, "without knowing it, Crown paid twice for the same services" provided by Dietrich in evaluating annuity providers. Decl. Raisner Exhibit D at ¶ 153 at 41.

22. This Court found "serious questions whether the conduct of Crown's officers and Board of Directors was directed more at fulfilling their fiduciary obligations to the creditors of an insolvent corporation than at fulfilling their fiduciary obligations to the corporation's pensioners." Decl. Raisner Exhibit F at 15:21-25. The same finding applies to Beck as he seeks to favor the creditors at the expense of pensioners.

IV. DISCUSSION

A. THE SETTLEMENT FUNDS CONSIST OF PENSION ASSETS, WHICH ARE NOT AVAILABLE TO CREDITORS UNDER THE LIQUIDATION PLAN.

23. Beck's Motion turns upon characterizing the settlement sum as a recovery of monies that are not pension assets, because pension assets must be returned to the Pension account to provide for benefits, plan administration and satisfaction of the judgment issued by this Court. To prevent return of the $1.7 million to the pension fund, Beck makes several assertions that do not hold up and omits any mention at all of controlling documents and history.

24. The Motion, standing alone, would lead one to believe that the $85 million transferred to the Hartford never were pension assets at all, but paid by the sponsor with general assets. In reality, the funds were transferred from the pension plan by the plan administrator, which was at that time the Crown Board of Directors, which served also as Trustee. Decl. Raisner Exhibit F at 21-22. The Motion omits any reference to Beck's present and continuing role as a fiduciary to the pension plan, as plan administrator and plan Trustee, positions acquired by succeeding to the Crown Vantage Board of Directors.

25. As successor to the Crown Board, Beck stands in the position of trustee of the pension plan. As trustee and plan administrator, Beck is not at liberty to direct the assets away from the plan to creditors. What Beck attempts is tantamount to seeking a reversion expressly denied by this Court and the Ninth Circuit in the related adversary proceeding pending where certiorari is pending in the Supreme Court. Only if the Supreme Court could reverse this Court's rulings and permit the settlement sum to be made available to creditors. This follows from the ERISA requirement that the transfer of plan assets when annuities are purchased for plan termination to be made not by the sponsor, but by the plan administrator.

26. The fact that the Crown Board was also the administrator does not mean that the Crown Board acted as plan sponsor and somehow acquired ownership of the pension assets before they were transferred to Hartford for the purchase of annuities. ERISA, as well as the Internal Revenue Code do not contemplate pension assets becoming property of a plan sponsor without all benefit liabilities being satisfied first. *See* ERISA §403(c)(1), 29 U.S.C. § 1103(c)(1) (assets of a plan shall never inure to the benefit of any employer.) *See also* ERISA §§ 4041, 4044, 29 U.S.C. §§ 1104, 1344. Once it is conceded that the annuities were purchased with pension assets rather than with the assets of the sponsor, and further conceded that surplus plan assets have been denied to the plan sponsor by this Court, it follows inexorably that the settlement funds based upon victimization of the pension plan in its purchase of annuities must accrue to the benefit of the pension plan. Such funds are for the exclusive benefit of the participants and beneficiaries and covered by the judgment entered in the related adversary proceeding in No. 01-4375 AN. *See* 29 U. S. C. § 1103; *Resolution Trust Corp. v. Financial Inst. Ret. Fund*, 71 F.3d 1553, 1556-58 (10th Cir. 1995).

1. Beck's Motion Mischaracterizes The Terms Of The Hartford Settlement.

27. The Motion mischaracterizes the Hartford settlement to make it appear that no benefit is intended to pension plans, but only to plan sponsors. To this end, the Motion states: That "the payment was not derived from amount of assets in the Pension Plan No. 7 or any other financial figure directly related [to] the assets in Pension Plan No. 7." Motion ¶ 10 at 3:21-22. This statement is literally untrue, unless the plan assets transferred to the Hartford in October 2001 were not plan assets or somehow deemed to be no longer "in" the pension plan. The assets transferred in fact accounted for all but about $5 million out of more than $89 million that was in

the plan. The Motion goes on to speak of a computation of Hartford:

> . . . it was calculated by Hartford using a formula in the Hartford Agreement involving the sale of annuities where, at the time of the sale, a production based incentive agreement was in place and result in either a payment to a broker or consultant, or other related criteria.

Motion ¶ 10 at 3:22-26.

28. The reality of the formula used in the Hartford Agreement was to first consider the amount "paid in premiums for each Eligible Annuity," then to use that number to determine the pro rata share of the total settlement fund, as clearly stated in the Agreement itself. See Decl. Raisner, Exhibit E, ¶ 3(b)(iii)-(iv) at p. 4. The Motion then states without any supporting documentation, that "Hartford would not pay any funds to retirement plans; rather it would pay only to plan sponsors." Motion ¶ 11 at 4:1-2. This statement cannot be squared with the Agreement itself and it contradicts the statements of the Attorneys General on the Connecticut Attorney General website, Decl. Raisner Exhibit C.

29. In any event, it is not Hartford's prerogative to determine how the settlement funds are to be characterized. The funds were paid over by the plan administrator and should be returned thence (*i.e.*, to Beck), the plan fiduciary. But Beck does not have discretion to pay the money to creditors of the Liquidating Trust. Nor does Hartford have a say as to that matter. The absence of any documentation on this point, or any citation to legal authority shows weakness in Beck's position, which is not tenable. Statements concerning what Hartford "has indicated to counsel" about how it "considers" the settlement to involve only the claims of Plan Sponsors Motion ¶ 11 at 3:27-28, are hearsay statements of an anonymous person, not within any exception to the hearsay rule, and merely speculative.

30. Beck then asserts that he "believes" that the settlement funds are "cash proceeds from the disposition of the Trustee's right of recovery under a settlement between Hartford and Crown as sponsor of Pension Plan No. 7," Motion ¶ 12 at 4:3-6. However, there is no settlement between Hartford and Crown at all, only a release form that Beck signed on October 6, 2006, a document that cannot reasonably be construed as affecting a settlement of any kind between the Hartford and plan sponsor. The fact that a plan sponsor decided that annuities should be purchased with plan assets does not provide the plan sponsor or plan trustee with a right to keep funds recovered by state attorneys general and paid out on the basis of pro rata amounts of plan assets used to purchase annuities. Among other things, it would violate the prohibited transaction rule of ERISA § 406, 29 U.S.C. § 1106. It would also show a violation of ERISA general fiduciary duties under ERISA §404, 29 U.S.C. § 1104.

31. The assertion that the settlement proceeds results from a settlement between Hartford and Crown is not reasonable or credible. The Motion's references the Liquidating Plan of Reorganization and rights created there as if they were superior to duties established under ERISA, However, the Liquidating Plan of Reorganization could not extinguish ERISA rights. Therefore, it is beside the point that the Motion contends that pre-petition lenders with class two claims "are entitled to participate in their appropriate share," of the proceeds. Motion ¶ 13 at 4:8-9. The trustee asserts his own belief as a basis of entitlement to the settlement sum, but such belief will not suffice: It is not credible for the trustee to state that he "further believes that Pension Plan No. 7 does not have any interest in such funds" Motion ¶ 15 at 4:18. It cannot be news to the trustee that a recovery from the expenditure of pension assets should accrue to the benefit of a pension plan. The trustee's difficulties as successor to the Crown Board cannot blind him to the legal issues litigated for

years in this Court, the District Court, the Ninth Circuit, and now in the Supreme Court.

2. The Settlement Is Intended To Directly Benefit The Pension Plan, Not The Creditors.

32. Settlement is not intended to benefit the creditors. The Trustee's position cannot be squared with the views of the Connecticut Attorney General, who makes the following unequivocal statement on his official web site:

> The settlement will provide $16.1 million directly to the pension plans harmed by the scheme . . . Under these agreements, The Hartford secretly paid brokers millions of dollars in exchange for brokers steering pension plan purchases of annuities, and providing inside information on competitive bidding.

The Decl. Raisner Exhibit C (emphasis supplied). In contrast to the Attorneys General who entered this settlement with Hartford, Beck seeks to deny all recovery to the pension plan. Instead the motion proposes that pre-petition lenders, rather than anyone harmed by the annuity purchase, receive the benefit of The Hartford settlement with the Attorneys General. That is not what the settlement was intended to do.

3. The Liquidating Plan Of Reorganization Did Not Create A Claim To The Settlement Proceeds On The Part Of The Liquidating Trust.

33. Beck's motion seeks shelter in the Crown Liquidating Plan of Reorganization and refers to §7.3 thereof providing that "the Debtors' assets vested automatically in and were transferred to" the Liquidating Plan of Reorganization could take no plan assets and does not purport to. Indeed, the disclosure statement contains certain amendments that would conflict with a disregard for continuing plan sponsor functions. See Decl. Raisner Exhibit G.

4. Settlement Funds Were The Result Of The Annuity Purchased By The Plan And A Remedy For Wrong-doing By The Hartford In The Annuity Purchase Transaction.

34. Such recoveries are properly returned to the party that made the expenditure that was invested with the harm to be prevented, namely the pension plan. No sponsor funds were expended or lost in the process, and Beck's Motion does not attempt to allege that such was the case. Instead, Beck's claim to The Hartford settlement funds appears to rely on a sleight of hand technique in which pension assets are paid out from the pension plan but recovery intended for the pension plan is routed to the plan sponsor instead. No legal or contractual basis exists for characterizing the Hartford fund recovery as assets not belonging to the pension plan.

B. BECK'S ERISA DUTIES AS PLAN TRUSTEE AND PLAN ADMINISTRATOR REQUIRE HIM TO DEAL WITH ALL PLAN ASSETS WITH AN EYE SINGLE TO THE INTERESTS OF PENSION PARTICIPANTS AND BENEFICIARIES.

35. A central issue in the related adversary proceeding No. 01-4375-AN in this Court as well as in the Court of Appeals has been the duty of pension plan fiduciaries to act "with an eye single" to the interest of pension plan participants and beneficiaries. *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982), quoted in *Pilkington PLC v. Perelman*, 73 F.3d 1396 (9th Cir. 1995). That adversary proceeding concerned fiduciary breaches of the Crown Board of Trustees, which violated its fiduciary obligations in implementing the plan termination. Beck has elected to defend those acts of the Crown Board. But here Beck himself has violated the central ERISA fiduciary precept. The positions of plan trustee and plan administrator are filled by Beck as successor to the Crown Vantage Board of Trustees. *See PBGC v. Pritchard Mfg. Co., (In re Esco)*, 33 F.3d 509 (5th Cir. 1994), *rehearing*

50 F.3d 315 (5th Cir. 1995) (Trustee steps into shoes of a administrator). In those positions of responsibility, Beck must be guided by the strict ERISA rule that plan assets are held in trust with the interest of the participants and beneficiaries whose interest he must serve exclusively when it comes to plan assets.

36. In bringing this Motion Beck seeks some shelter, perhaps in part because of tax implications, see Motion ¶ 15 at 4:19-20 ("Internal Revenue Service And/Or Other Parties Might Have An Objection"). Indeed, the taking of any of the pension assets as a reversion would be taxed at a high rate designed to discourage termination in order to accomplish reversion.

C. BECK'S SECRECY CONCERNING THE HARTFORD SETTLEMENT SHOWS UNCLEAN HANDS AND PRECLUDES HIM FROM KEEPING THE SETTLEMENT FOR THE BENEFIT OF CREDITORS.

37. The Motion, far from the "full disclosure" asserted, Motion 15, shows instead a calculated effort to hide $1.7 million from the pension plan. It is disturbing that Beck has failed to this day to mention the Hartford settlement in the related adversary proceeding or even reveal this new event to the Supreme Court. Apparently, the litigation approach was to keep quiet until the time for briefing had passed in the Supreme Court Petition for Certiorari proceeding.

38. The settlement funds could only be available to creditors if this Court's judgment was reversed on the merits by the Supreme Court. While Beck has acted to secure the settlement proceeds for creditors of the estate, the law has not changed in his favor. ERISA still controls the conduct of plan fiduciaries toward plan assets and administration.

V. CONCLUSION

For the reasons stated above, the undersigned requests on behalf of PACE and former member participants in Crown

Vantage pension plans, Edward J. Miller, Jeffrey D. Macek and others similarly situated, Plaintiffs in related Adversary No. 01-4375-AN, that Beck's motion be denied, that a hearing be scheduled and that an opportunity to discover facts and present evidence and further argument be afforded these Objectors.

Dated: Respectfully submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
By: /s/ Christian L. Raisner
CHRISTIAN L. RAISNER
Attorney for Creditor/Plaintiffs
PACE International Union

U.S. Bankruptcy Court
Northern District of California (Oakland)

[Filed 03/15/2000]

Bankruptcy Petition #: 00-41584

Debtor CROWN VANTAGE, INC., CROWN PAPER, INC.,

Filing Date	#	Docket Text
01/10/2007	1804	Objection To Motion to Apply Settlement Proceeds as General Funds; Request for Hearing (RE: related document(s) 1802 Notice). Filed by Creditors Jeffrey D. Macek, Edward J. Miller, PACE International Union (Attachments: # 1 Declaration of Christian L. Raisner In Support of Objection to Motion to Apply Settlement Proceeds as General Funds; Request for Hearing # 2 Exhibit A, B-1 and B-2 to Declaration of Christian L. Raisner# 3 Exhibit B-3, B-4 and C to Declaration of Christian L. Raisner # 4 Exhibit D to Declaration of Christian L. Raisner # 5 Exhibit E and F to Declaration of Christian L. Raisner # 6 Exhibit F to Declaration of Christian L. Raisner) (Raisner, Christian) (Entered: 01/10/2007)

12/22/2006	1803	Certificate of Service (RE: related document(s) 1801 Motion Miscellaneous Relief, 1802 Notice). (Law, Kenneth) (Entered: 12/22/2006)
12/21/2006	1802	Notice Regarding Motion to Apply Settlement Proceeds as General Funds and Opportunity for Hearing (RE: related document(s) 1801 Motion to Apply Settlement Proceeds as General Funds and Opportunity for Hearing Filed by Trustee Other Prof Jeffrey H. Beck (Attachments: # (1) Exhibit 1 # (2) Exhibit 2) (Law, Kenneth)). Filed by Trustee Other Prof Jeffrey H. Beck (Law, Kenneth) (Entered: 12/21/2006)
12/21/2006	1801	Motion to Apply Settlement Proceeds as General Funds and Opportunity for Hearing Filed by Trustee Other Prof Jeffrey H. Beck (Attachments: # 1 Exhibit 1 # 2 Exhibit 2) (Law, Kenneth) (Entered: 12/21/2006)

APPENDIX C

STATE OF CONNECTICUT
ATTORNEY GENERAL'S OFFICE

Connecticut Attorney General's Office

Press Release

Attorney General Announces $20 Million Settlement With The Hartford Involving Secret Kickback Allegations

May 10, 2006

Attorney General Richard Blumenthal today announced that The Hartford Financial Services Group, Inc. (The Hartford) will pay $20 million under an agreement with Connecticut and New York to settle allegations that it paid brokers millions of dollars in secret kickbacks in exchange for steering lucrative pension plan investment business to The Hartford.

The Hartford is one of the oldest and largest investment and insurance companies in the country, with millions of customers worldwide. The settlement will provide $16.1 million directly to the pension plans harmed by the scheme and $1.95 million in penalties each to Connecticut and New York.

From 1998 through 2004, The Hartford entered into concealed financial agreements with brokers, including Dietrich & Associates, Inc. (Dietrich), Brentwood Asset Advisors (Brentwood), Glastonbury-based USI Consulting Group, and BCG Terminal Funding.

Under these agreements, The Hartford secretly paid brokers millions of dollars in exchange for brokers steering pension plan purchases of annuities, and providing inside information on competitive bidding.

"The Hartford was at the hub of a series of secret conspiracies that enriched both the brokers and The Hartford at the expense of their customers," Blumenthal said. "Our evidence shows a shocking systematic scheme that betrayed their moral and legal duties."

The settlement involves one line of business - terminal and maturity funding group annuities. Terminal funding agreements are annuities purchased by pension plans when the plan is being terminated or frozen due to the dissolution or restructuring of a company. Maturity funding agreements are used by ongoing pension plans to fund future retirement obligations for employees.

"The Hartford paid secret kickbacks to brokers who steered pension plan business and undercut the competitive bidding process—raising the pension plan's costs," Blumenthal said. "The Hartford and its co-conspirators elaborately concealed kickbacks as so-called expense reimbursement agreements—really just false fronts for the scheme. The scheme exploited pension plans - taking funds from retirement vehicles that are the bedrock of our nation's workers' livelihoods.

"There is no pleasure in uncovering wrongdoing by one of Connecticut's best respected corporate citizens. Our continuing investigation of The Hartford and others must be pursued wherever the evidence leads. The Hartford has cooperated—taking the high road—and we hope others will as well. The message is that no one in this industry—insurers or brokers, big or small—can break the law and betray their trust.

"Our reforms—stopping contingent commission agreements—will help prevent future insurance abuses. This investigation was spurred by a whistleblower and we hope others with knowledge will come forward."

Blumenthal said this settlement culminates a year-long investigation conducted jointly with the New York Attorney General's office. Blumenthal said The Hartford cooperated with the investigation.

Department of Consumer Protection Commissioner Edwin R. Rodriguez said, "This settlement is part of an ongoing process to bring transparency to the insurance industry. The message is that the consumer needs to be dealt with honestly and fairly—and not with the kind of backdoor steering and undisclosed compensation to third parties that occurred here. I hope all insurance companies will take note that this kind of anti-consumer behavior will be dealt with to the full extent of the law."

Blumenthal said The Hartford—unknown to pension plan sponsors—paid tens of thousands of dollars, and in some cases hundreds of thousands of dollars of these secret payments to brokers. The cost of these payments were built into sponsors' annuity purchases.

For example, Crown Vantage, Inc. paid its broker, Dietrich, a $168,287 fee for its services in helping it purchase an annuity for its pension plan. Unknown to Crown Vantage, The Hartford also paid the broker a $841,437 secret payment for bringing the business to The Hartford.

Similarly, Brentwood received a disclosed commission of $150,918 for placing Tenet Health System's pension plan with The Hartford. However, The Hartford and Brentwood failed to disclose a back-end payment of $238,983 to Brentwood for delivering the business to The Hartford. G.E. Consumer Finance in Stamford and Kuehne & Nagel in Hamden were also victimized by the scheme.

These secret agreements—dubbed "expense reimbursement agreements," "ERAs," or "consulting agreements"—claimed to reimburse brokers for expenses related to placing an annuity with The Hartford.

In reality, these arrangements were shams used to pay kickbacks in return for steering business to The Hartford so that The Hartford could increase its share of the market. Or, as described in an email by an employee of The Hartford,

ERAs are "used to stimulate business that we otherwise would not get."

In order to receive these secret payments, The Hartford's ERAs required brokers to meet predetermined volume thresholds. For example, under Dietrich's 2003 agreement, if Dietrich placed less than $5 million of premium in a three-month period, its maximum quarterly ERA reimbursement would be $37,500. Under the same agreement, if Dietrich placed over $15 million in a quarter, its maximum quarterly reimbursement would jump to $375,000.

The Hartford also conditioned its undisclosed payments on brokers delivering "quality" business—or business that allowed The Hartford to obtain "adequate" profit margins. This practice discouraged brokers from negotiating too hard against The Hartford, and saddled brokers with a significant conflict of interest.

Under the ERAs, brokers also provided The Hartford with inside intelligence on bidding held for the purchase of the annuities, which gave The Hartford an advantage over its competitors.

For example, The Hartford paid Brentwood an undisclosed $100,000 for providing inside information that landed The Hartford the PricewaterhouseCoopers' $500 million pension plan annuity purchase. An email by an employee at The Hartford recounted that the Brentwood provided "The Hartford with the details of the bidding process and competitors' bids on [the] final day . . ."

In exchange for secret payment schemes over the years, The Hartford captured upwards of $800 million worth of business, reaping millions more in investment profits. Brokers received close to $4 million in concealed payments that were unknowingly subsidized by their pension plan clients.

As one executive of The Hartford said in an internal email, "distribution partnerships" worked because the brokers "like our money."

Under this settlement, The Hartford has also agreed to cooperate with the attorneys general in their continuing investigation of the insurance industry.

Blumenthal thanked those in his office who worked on the investigation—Assistant Attorneys General Rachel Davis and Mark Kohler, Paralegal Lorraine Measer, Chief Information Officer Evelyn Godbout, and legal intern Danielle Suchcicki, under the direction of Assistant Attorney General Michael Cole, Chief of the Attorney General's Antitrust Department.

APPENDIX D

SUPERIOR COURT
JUDICIAL DISTRICT OF HARTFORD

STATE OF CONNECTICUT,
Plaintiff,

v.

THE HARTFORD FINANCIAL SERVICES GROUP, INC.;
and HARTFORD LIFE, INC.,
Defendants.

May 10, 2006
Return Date: May 23, 2006

COMPLAINT

I. SUMMARY OF THE CASE

1. This action seeks redress for a scheme perpetrated by The Hartford Financial Services Group, Inc. and Hartford Life, Inc. (collectively, "The Hartford") to secretly and systematically induce brokers to steer their clients—pension plan sponsors and fiduciaries—to purchase single premium group annuities from The Hartford. To ensure the success of the scheme, The Hartford funneled tens of thousands of dollars, and in some cases hundreds of thousands of dollars, of secret payments that were, unknown to the pension plan sponsor, built into the cost of their annuity.

2. Every year over a billion dollars of retirement plan assets are invested in single premium group annuities by pension plan sponsors, including Fortune 500 companies, small businesses, healthcare systems and hospitals, public education systems, and other entities. The annuities are purchased and used to satisfy accrued pension liabilities for

both ongoing defined-benefit pension plans or frozen defined-benefit pension plans when those plans are terminated or restructured. Competition for these investment plan asset dollars among insurance companies is fierce, with many insurers competing for the relatively small number of plans that will purchase these annuities annually. Moreover, the market for group annuities shows no sign of abating, as several large companies, including I.B.M., Verizon, Hewlett-Packard, Motorola and Sears have all recently announced that they have frozen their pension plans for many employees.

3. Due to the complexities associated with a pension plan's administrative requirements and legal obligations, the plan sponsor's fiduciary obligations to the plan, and the intricacies of evaluating and selecting an appropriate annuity, many plan sponsors and fiduciaries turn to the services of an experienced pension broker to guide and navigate the plan through the myriad steps necessary to successfully make the right annuity choice. Oftentimes the process of purchasing an annuity requires a broker to arrange for and conduct a course of preliminary and final bidding among the competing insurers. At the conclusion of the bidding the broker will most often provide the plan with a written recommendation regarding the most appropriate annuity for the plan to purchase.

4. Beginning at least as early as 1998, The Hartford conceived of a scheme to preserve and increase its share of the market for single premium group annuities by secretly compensating selected brokers in return for the brokers steering their plan clients to The Hartford for the purchase of single premium group annuities. The Hartford devised what became known as Expense Reimbursement Agreements, and later consulting agreements, which purported to reimburse the brokers for expenses they incurred in placing an annuity with The Hartford, or reimbursed the broker for alleged services they provided The Hartford. In reality, as confirmed in an internal The Hartford email, these financial arrangements

were intended "to change[ ] the buying habit of the intermediary . . . that is what we are trying to accomplish." In essence, then, the agreements were nothing more then sham arrangements, utilized to provide the appearance of legitimacy to what was, in effect, a furtive plan to pay undisclosed sums to the brokers in return for the brokers steering an increasing volume of "profitable" business to The Hartford, and providing The Hartford with "last looks" and inside intelligence on the bidding, which ultimately gave The Hartford an advantage that was not otherwise available to the other competing insurers.

5. Thus, while the brokers held themselves out as the plan's "expert" consultant and "fiduciary", they were secretly working to ensure that The Hartford would be selected as the annuity provider in order that the broker could achieve additional undisclosed compensation. In a 2003 e-mail discussing the "goals of the ERA", The Hartford's salesman stated:

> The expectations of the ERA agreements is to receive favorable status in quoting activity including but not limited to receiving favorable treatment in the bidding process (last looks), being able to achieve expected/ attractive [profit] margins either through exploring alternate solutions and value added actions by the intermediary [broker].

Further, by The Hartford's conditioning the secret payment on its receipt of profitable business, The Hartford created a significant conflict of interest between the broker and its client, because if the broker negotiated too low a premium, the broker would not receive its secret payment. The hidden payments, which were in addition to the disclosed commissions The Hartford paid the brokers, or the fees the plans agreed to pay the brokers directly, were, unbeknownst to the plans, added to their premium and resulted in increased costs for the plans.

6. Through these arrangements, The Hartford not only made affirmative, material and deceptive misrepresentations to its customer, but its conduct also resulted in contributing—in fact causing—a breach of the broker's fiduciary duties to its client. In essence, The Hartford purchased the loyalty of the broker.

7. Throughout the period 1998 through 2004, The Hartford paid out millions of dollars of undisclosed payments, causing the plans to pay more in annuity premiums than they should have paid. In return, The Hartford captured upwards of $800 million dollars worth of annuity placements, and reaped millions of dollars in investment profits on the money it invested from sales it might otherwise not have made, as well as future profits not yet realized from its long-term investment of the premiums.

8. In pursuing these and other corrupt business practices, The Hartford violated the Connecticut Unfair Trade Practices Act. Pursuant to Conn. Gen. Stat. § 42-110m, the Connecticut Attorney General, in the name of the State of Connecticut, seeks restitution, disgorgement, and civil penalties for the injuries suffered by Connecticut consumers and other consumers, as well as other injunctive and equitable relief to prevent these corrupt business practices from happening again.

II. PARTIES

9. Plaintiff State of Connecticut, represented by Richard Blumenthal, Attorney General of the State of Connecticut, brings this action at the request of Edwin R. Rodriguez, Commissioner of the Department of Consumer Protection for the State of Connecticut, pursuant to Conn. Gen. Stat. § 42-110m of the Connecticut Unfair Trade Practices Act (CUTPA).

10. Defendant The Hartford Financial Services Group, Inc. is a Delaware corporation with its principal place of business in Hartford, Connecticut. The Hartford Financial Services

Group, Inc. sells a variety of insurance products to businesses including group annuity products. At all times relevant to this Complaint, The Hartford Financial Services Group, Inc. transacted business in the State of Connecticut through its various local and regional offices. Decisions regarding the group annuities at issue here were made in Connecticut by employees of The Hartford Financial Services Group, Inc. working in Connecticut. The agreements to make the undisclosed contingent commission payments were entered into in Connecticut. The secret payments to the brokers were sent from Connecticut, and the ill-gotten premium The Hartford Financial Services Group, Inc. derived from the scheme were received in Connecticut.

11. Defendant Hartford Life, Inc. is a Delaware corporation with its principal place of business in Simsbury, Connecticut. Hartford Life, Inc. is a leading provider of investment vehicles designed to help both individual investors, institutions, corporate and government employers, and high-net-worth individuals. At all times relevant to this Complaint, Hartford Life, Inc. transacted business in Connecticut through its officers, employees, and agents.

12. Whenever reference is made in this Complaint to any representation, act or transaction of any entity, such allegation shall be deemed to mean that the principals, officers, directors, employees, agents or representatives while actively engaged in the course and scope of their employment, did or authorized such representations, acts, or transactions on behalf of that entity.

III. THE PLAYERS

A. The Hartford

13. The Hartford Financial Services Group, Inc. is one of the oldest and largest investment and insurance companies based in the United States with nearly 30,000 employees and $2.1 billion in income in 2004. The Hartford Financial

Services Group, Inc. is a leading provider of investment products—annuities, mutual funds, college savings plans—as well as life insurance, group and employee benefits, automobile and homeowners' insurance, and business insurance. Through its employees, as well as through independent agents, brokers and financial institutions, The Hartford Financial Services Group, Inc. serves millions of customers worldwide. In 2005, The Hartford Financial Services Group, Inc. was ranked 88th on the Fortune 100 list of companies.

14. Hartford Life, Inc., along with its subsidiary, Hartford Life and Annuity Company, is one of the most respected insurance companies in the United States which, as the company touts, "has been meeting its customer obligations since 1902." Among the investment products sold through the Hartford Life and Annuity Company are variable and fixed annuities, mutual funds, 401(k) plans, terminal and maturity funding agreements, structured settlement and institutional annuities and guaranteed investment contracts. The Hartford Financial Services Group, Inc., Hartford Life, Inc., and its subsidiary, Hartford Life and Annuity Company will, hereinafter, be referred to as "The Hartford".

B. The Brokers

15. In the annuity market, as is common with many other investment and insurance products sold within the United States, brokers play a significant and important role in assisting institutional clients in the selection of an appropriate annuity. The broker's role with respect to the purchase of a single premium group annuity for a pension plan is to assist the client—often the plan administrator or fiduciary—with assessing the myriad issues and factors necessary to selecting the "safest available annuity" for the benefit of retirement plan participants.

16. Broker Dietrich & Associates, Inc. ("Dietrich") is a Pennsylvania corporation with its principal place of business in Plymouth Meeting, Pennsylvania. Dietrich is a pension

financial services firm providing specialized annuity brokerage and consulting services to institutional clients in the area of single premium group annuity contracts and is the "largest independent broker in the single premium group annuity market." Dietrich promotes itself on its website and through other marketing materials as positioned, through its knowledge and relationships, to assist its clients in the evaluation and selection of group annuity products. Part of its sales pitch to prospective clients is that Dietrich is "totally objective in our carrier evaluation and selection process . . . ." As a result of Dietrich's expertise, experience and objectivity when evaluating potential annuities, Dietrich claims that its "clients have the assurance that contracts purchased through our organization are the most competitive available."

17. Broker Brentwood Asset Advisors ("Brentwood"), with offices in California and Florida, advertises itself as an annuity search service broker that prides itself on the "unrivaled due diligence" it provides its clients searching for the right annuity for their plan. Owing to Brentwood's "passion for excellence" and knowledge within the annuity marketplace, and the relationships it has built over the years with insurance companies, Brentwood claims to provide its clients with services "that enable the fiduciary to make an informed decision." In 2002, Brentwood estimated that it placed 69% of all group annuity contracts sold nationwide.

18. Broker BCG Terminal Funding ("BCG"), with offices in Texas, Massachusetts, Illinois, Kentucky, and California, markets itself as one of the largest terminal funding consulting placement firms in the nation. On its website, BCG tells prospective clients that it will "help them cut through the clutter" of information and choices in the annuity marketplace. BCG positions itself as "YOUR ally and confidant" and the one a client can "trust to make the proper recommendations" to "navigate you through the sea of decisions needed to make proper fiduciary choices."

19. Broker USI Consulting Group ("USI"), is part of USI Holdings Corporation, one of the United States' largest property & casualty, benefits broker, and consultants. USI is headquartered in Glastonbury, Connecticut. On its website, and through other promotional materials, USI markets itself as a firm that does not address a client's particular needs with a "preconceived notion" as to what is the right solution. Rather, when a client "partners" with USI, that client taps into the company's many consultants whose claimed goal is to "maximize the value of every dollar spent" to provide the best in "value-added service" in selecting the right investment.

IV. THE SINGLE PREMIUM GROUP ANNUITY MARKETPLACE

A. Background

20. A single premium group annuity ("SPGA") contract is a fixed income investment purchased by a plan sponsor to fund immediate annuities for retirement plan participants who are leaving their plan and wanting to receive their benefit distribution in the form of annuity income. Additionally, a SPGA is used to satisfy accrued pension liabilities for ongoing and frozen defined benefit plans when such plans are terminated, due, perhaps, to a bankruptcy, merger, restructure, or when plan liabilities are settled for other purposes. An SPGA is often purchased by an employer or plan sponsor to provide a monthly annuity benefit payment for both immediate annuitants (a company's retirees due a retirement benefit) or for deferred annuitants (those employees or plan participants not yet eligible for retirement benefits).

21. The Hartford's SPGAs often take the form of one of two different types of contracts: Terminal Funding Agreements and Maturity Funding Agreements.

22. A Terminal Funding Agreement is used in circumstances where an employer terminates a pension plan while still fulfilling its fiduciary responsibility to provide current

and future retiree benefits. Such agreements provide guaranteed, fixed periodic payments to a designated group of participants under a defined benefit plan. Terminal Funding Agreements occur due to mergers and acquisitions, bankruptcies, plant shutdowns or court ordered liquidations.

23. A Maturity Funding Agreement is a group fixed annuity that provides departing plan participants with fixed income payments for life or some designated period.

24. SPGA contracts, whether terminal or maturity, range in size from tens of thousands of dollars in premium, to upwards of hundreds of millions of dollars in premium.

25. A number of insurance companies sell SPGA contracts and compete for plan dollars in the marketplace. Among the insurance companies that sold SPGA contracts during the relevant time period are: The Hartford, Principal Life Insurance Co. ("Principal"), Travelers Insurance Co., AIG Life Insurance Co., John Hancock Life Insurance Co., Continental Assurance Company ("CNA") and United of Omaha Life Insurance Co. ("United of Omaha").

26. No two insurance companies are exactly alike and, thus, while insurance rating services such as Standard & Poor's and Moody's are helpful in assessing the credit worthiness of a given insurer, a myriad of other factors must be analyzed to ensure the plan sponsor or fiduciary chooses the "safest available annuity" when it buys a group annuity for a pension plan.

27. In 1995, the United States Department of Labor ("DOL") issued Interpretive Bulletin 95-1, which outlines some of the criteria a plan administrator or other fiduciary should consider to determine the "Safest Available Annuity" for retirement plan participants. According to the DOL bulletin, a plan administrator or fiduciary should consider its purchase decision after considering the following factors:

- The quality and diversification of the annuity provider's investment portfolio;

- The size of the insurer relative to the proposed contract;
- The level of the insurer's capital and surplus;
- The lines of business of the annuity provider and other indications of the insurer's exposure to liability; and
- The structure of the annuity contract and the guarantees supporting the annuities, such as the use of separate accounts.

28. Given the number of factors to be considered, the breadth and diversity of insurance companies in the market, the particular needs of a particular plan, and the overarching requirement that the selected insurer meet the safest annuity obligation imposed by the Employee Retirement Income Security Act of 1974 ("ERISA"), it is only prudent that a plan administrator or fiduciary should seek the guidance, expertise and experience of an SPGA broker to assist the plan in its due diligence in order to make an appropriate investment choice.

B. The Annuity Selection Process

29. While the process of purchasing an SPGA contract for a plan differs depending on the needs of the plan and the broker selected to consult and shepherd the process, most SPGA brokers generally follow a similar procedure:

- Consult with the plan regarding the timing and structure of the annuity purchase;
- Prepare the request for proposal ("RFP") incorporating all of the plan's benefits;
- Send the RFP and accompanying participant data to all of the bidding insurance companies and answer their questions;
- Conduct the bidding process;

- Negotiate each insurance company to its lowest price;
- Make a written recommendation to the plan sponsor or fiduciary;
- Manage any post-sale flow of data from the plan to the selected insurance company;
- Assist the plan sponsor's legal team with the wording of the final annuity contract and certificates; and
- Oversee the process of delivery of the annuity contracts or certificates to plan participants and beneficiaries.

30. The bid process followed by most SPGA brokers is generally accomplished in two phases: a round of preliminary bidding, followed by a round of final bidding. The time between the preliminary and final bids may be a matter of days, weeks or months, depending on a number of factors including changes in plan data, interest rate fluctuations (investment yields, from which the carrier expects to pay the annuitants, are a function of the rates at which insurers expect to invest the plan's premium), and other vagaries of that specific purchase.

31. Most, if not all bids, are conducted through an open bid. In other words, after the broker receives each bidding insurer's preliminary bid, the broker will usually share the results of the preliminary bid with all the bidders. Thus, each insurance company knows not only its own bid, but the bid of each of its competitors prior to the final bid.

32. The final bid is usually set to occur on a specific date at a specific time. Those bidding insurance companies that remain in the bidding after the preliminary round are expected to provide their final bid by a predetermined deadline. Sometimes, but by no means the rule, the broker might

attempt to further negotiate with the two or three lowest bidders after the final round to obtain the lowest price for the plan.

33. Consistent with the broker's role as the plan sponsor's independent expert or fiduciary hired to guide the plan sponsor through a sea of decisions, the plan expects, because the law requires, that the broker's duty is to act solely for the benefit of its principal—the plan sponsor.

34. Brokers are compensated for their services in one of two ways: (a) a fee negotiated between the plan sponsor and the broker, which is paid directly to the broker or (b) a commission agreed to by the plan sponsor and paid by the selected insurance company, which usually builds the commission into the final annuity premium.

V. THE HARTFORD'S SPGA BROKER COMPENSATION PACKAGE

35. Beginning at least as early as 1998, and continuing through 2004, The Hartford entered into written and verbal agreements with SPGA brokers, including Dietrich, Brentwood, BCG and USI, purportedly for the purpose of reimbursing those brokers for expenses they incurred in placing The Hartford's group annuity product with a particular plan. These agreements were formally referred to as Expense Reimbursement Agreements or Marketing Allowances (hereafter collectively referred to as "ERAS"). In addition, for certain times throughout the period covered by this Complaint, The Hartford also entered into a Consulting Agreement with Brentwood, which was supposed to reimburse Brentwood for certain specified services that broker was to provide for The Hartford. The compensation to be paid to Dietrich, Brentwood, BCG and USI pursuant to these agreements was in addition to, not in, lieu of, the commissions or fees they received for their services to the plans.

A. Expense Reimbursement Agreements

36. The overall stated purpose of the ERA was to "reimburse [the broker] for certain reasonable administrative business expenses incurred by [broker] in supporting . . . the placement of single premium group annuity business with The Hartford." The reimbursable expenses included, but were not limited to, "training expenses, administrative support expenses, and miscellaneous selling expenses, not reimbursed from any other source."

37. Although the precise terms and conditions of the written ERA varied somewhat during the relevant time period, depending on the year and/or broker involved, the essential terms remained constant:

- The Hartford conditioned payment of the ERA on "evidence" that the expenses were incurred, thus requiring the broker to submit an expense account report or voucher detailing the expenses;
- Expenses were reimbursed up to, generally, 1% of the premium of a particular placement, although there were times when the amount was higher or lower;
- The business had to be "profitable", meaning supported by the final price;
- The Hartford had the right to audit the broker to verify the accuracy of expenses; and
- The Hartford required the broker to treat the ERA as confidential, unless disclosure was required by law, or if the broker deemed it "appropriate" to disclose to a prospective purchaser of SPGAs.

38. Additionally, the ERA contract generally was structured to hinge the amount of reimbursement the broker was eligible to receive on the broker's reaching certain "quarterly" and "annual" ERA reimbursement thresholds.

39. To qualify for a quarterly reimbursement, the broker had to meet predetermined quarterly premium thresholds. The threshold was established by The Hartford or, at times, through negotiation with the broker. For each stated quarterly premium threshold, there was a corresponding maximum expense reimbursement the broker would receive. For instance, under Dietrich's 2003 ERA, if Dietrich placed less than $5 million of premium in a three month period, its maximum quarterly reimbursement would be $37,500. On the other hand, under the same agreement, if Dietrich placed over $15 million in a quarter, its maximum quarterly reimbursement would be $375,000.

40. Under the "annual" feature of the ERA, a broker was entitled to qualify for an increased reimbursement if the broker's annual premium threshold exceeded certain predetermined thresholds. As an example, pursuant to Brentwood's April, 2002 ERA, if Brentwood placed more than $100 million in premium in a year, then Brentwood could earn up to an additional half a million dollars over and above its maximum quarterly ERA payments.

B. Consulting Agreements with Brentwood

41. Beginning at least as early as April, 2002, The Hartford also entered into a series of consulting agreements with Brentwood.

42. According to the written consulting agreement, the purpose of the contract was for Brentwood to "provide The Hartford with consulting and marketing advice with respect to the single premium group annuity business." Such advice included "information on industry best practices and trends", as well as "new product opportunities." The consulting agreement allowed for Brentwood to take on "[a]dditional specific consulting projects" with the concurrence of The Hartford.

43. In return for providing The Hartford with its consulting services, Brentwood was compensated $30,000 per quarter.

Beginning some time around 2004, however, the consulting payments were restructured and Brentwood received $3,000 per month.

44. Brentwood's consulting services agreement was part of its ERA with The Hartford. Hence, while Brentwood was receiving a $30,000 per quarter consulting retainer from The Hartford, it still had the opportunity for an additional payout if its annual SPGA premium placed with The Hartford exceeded $100 million. Beginning in 2004, when Brentwood's consulting payment was lowered to $3,000 per month, the annual SPGA premium threshold required to trigger an additional payout was also lowered, such that Brentwood was eligible for an additional payout if its annual SPGA premium exceeded $20 million.

VI. HARTFORD'S ERAs AND CONSULTING AGREEMENTS ARE A SHAM

45. The Hartford's ERAs and consulting agreements were nothing more than an incentive compensation arrangement for brokers that established a pay for performance model. As articulated in more detail below, The Hartford's definition of a broker's "performance" went well beyond bringing The Hartford a certain level of business.

A. The ERAs were Intended to Steer Business—"[H]ang a . . . carrot"

46. It cannot be denied that brokers incur expenses in marketing their services to prospective plans looking to purchase SPGAs, and in preparing RFPs, conducting bids and finalizing annuity contracts. Typical expenses are those associated with a broker's overhead, i.e., salaries, marketing materials, telephone, facsimile, computer expenses, rent, etc. Additional expenses may include travel, entertainment and access to credit information services. These business expenses are usually and rightly viewed by the buyer or here — the plan sponsor—as expenses covered under the fee paid by

the plan or the commission paid by the insurance company. In other words, the fee or commission should not be just pure profit to the broker.

47. The Hartford's ERAs did not simply reimburse brokers for expenses; they reimbursed only those brokers that delivered a certain amount of business to The Hartford.

48. At its root, what The Hartford was "trying to accomplish" through the ERA was, as laid out in an internal email, to "change[] the buying habit of the intermediary . . . ." Or, even more succinct, the ERA "has to be used to stimulate business that we otherwise would not get."

49. An internal The Hartford document, labeled "Confidential For Internal Discussion Only" (emphasis in original), noted that among the "objectives" of the ERA was that it "encouraged [a] continual flow of business", and "encourages a large dollar volume of business".

50. To acquire this flow of business, The Hartford crafted a "production based" model for "distributors." Thus, the thresholds established for the brokers, whether quarterly or annual, were supposed to be a "stretch number" with a "big dollar [payment] associated with that." The higher the threshold, the more business the broker needed to produce to receive its incentive payment.

51. In January, 2001, while discussing whether to enter into an ERA with USI, one of The Hartford's salesman explained to another of the company's executives that the "marketing allowance, as it was explained to me, is suppose [sic] to be a stretch in which 80-90% of the [brokers] would not reach it." The two employees of The Hartford then reviewed USI's 2000 production, roughly $11,500,000, and their expectation for USI's business in 2001 to "see if it makes sense to hang a $60 [thousand dollar] carrot." The Hartford described this arrangement in a proposal to USI of its "production based

override program", offering USI a $60,000 payout in return for 2001 production of "$30 to $40 million".

52. In 2001, USI settled on $80,000 in calculated payments in return for $40 million in production. The "same deal applied for BCG, at least on paper."

53. In approaching these thresholds and payments, however, The Hartford reserved its "best deal for [its] best customer[s]"—Dietrich and Brentwood. Overall, as summarized by an executive of The Hartford in an internal email, "distribution partnerships"—ERAs—worked, as The Hartford believed it gained an "advantage" because the brokers "like our money." Or, as The Hartford salesman explained the ERA program to BCG, "[b]ottom line was, you sell business with [The Hartford] you will make your money."

B. The Brentwood Consulting Agreements—Nothing More than an Upfront ERA

54. Contrary to the purpose purported in its written consulting contract with Brentwood, The Hartford had little interest in the consulting and marketing services Brentwood agreed to provide. Rather, both The Hartford expected and Brentwood understood that The Hartford was secretly paying Brentwood in advance for future production.

55. Beginning some time in March, 2002, Brentwood's executives raised the idea of a consulting agreement with The Hartford's executives. At that time, revenues for Brentwood's brokerage business were lower than expected. As a result, Brentwood's principal, Neil Ronco, discussed the concept of an "upfront" quarterly payment from The Hartford that could be disguised as a "consulting" arrangement.

56. The concept was clearly explained in a March, 2002 email from The Hartford's salesman to his superiors: Brentwood "would be placed on a 12-month retainer for $120,000 ($10,000) . . . . If they do not produce the business, then we

do not renew the next year or the difference is made up the following year." Moreover, clearly establishing that the payment was for production, not consulting or marketing advice, the email added, "[w]hen they produce over that amount, different projects can be added to account for the consulting fee in the additional amount."

57. In a series of meetings in March 2002, some by phone and some face-to-face, Brentwood and The Hartford executives discussed and eventually agreed to add the consulting agreement into the ERA that Brentwood had previously entered into with The Hartford. The concept ultimately agreed to by The Hartford was consistent with that first raised by Ronco: a $10,000 monthly payment to Brentwood and, as spelled out in the handwritten notes of one of The Hartford's salesmen intimately familiar with the consulting deal, "as the business comes in, increasing the quarterly consulting piece . . . ."

58. The first consulting agreement was executed in April, 2002. The $10,000 "consulting amounts" paid to Brentwood on a monthly basis were "built" into the SPGA premium The Hartford quoted for Brentwood's clients.

C. Labeling the ERA as Payment for "Expenses" was a Ruse

* * * *

Hartford disclosed only the commissions attributable to the annuity contract. Not once did The Hartford disclose the ERA amounts it had paid the brokers, even though those payments were directly attributable to each annuity contract.

87. Yet, the plans unknowingly were subsidizing the ERA and consulting payments as, in almost every instance, The Hartford built the ERA and consulting payments into the premiums it charged.

88. For example, in October 2001, Dietrich acted as broker for an SPGA purchase by Crown Vantage, Inc. Under the terms of the agreement between Crown Vantage, Inc. and Dietrich, the broker received a $168,287 commission. In addition, unknown to Crown Vantage, Inc., three months after The Hartford was awarded the contract the insurer paid Dietrich an additional undisclosed $841,437.94. The additional payment was built into the premium without Crown Vantage, Inc.'s knowledge.

89. Similarly, when Brentwood brokered the Willbros U.S.A., Inc. Pension Plan termination, The Hartford, as the winning carrier, paid Brentwood a duly disclosed $21,368 commission, plus an undisclosed ERA payment of $28,492, which the client nonetheless paid for because it was secretly priced into the premium.

B. The Hartford Knew that Brokers Failed to Disclose the ERAs to the Plans

90. The Hartford knew, or should have known, that the brokers failed to disclose to their own clients the existence of ERAs, consulting agreements, and the payments the brokers received thereunder.

91. The Hartford's written ERAs and consulting agreements contained an express confidentiality clause that significantly limited the brokers' ability to disclose the agreements to third parties.

92. Further, The Hartford knew, or should have known, that the brokers failed to disclose the payments received pursuant to ERAs and consulting agreements, because The Hartford itself omitted this information from its own written communications with plan sponsors and fiduciaries, thereby greatly facilitating concealment of this material fact.

93. Communications between the brokers and The Hartford during the relevant period confirm The Hartford's knowledge

that the brokers were not disclosing to their clients even the existence of the ERAs and consulting agreements, much less the payments the brokers were receiving under those agreements. On at least one occasion, The Hartford was expressly asked by Brentwood not to disclose the ERA if asked by GE Consumer Finance, Brentwood's client. On several other occasions, USI's employees told The Hartford's SPGA sales team in emails that its compensation should total 3%: "The client will see the 2% in the proposal, USI should receive the other 1% as an ERA."

94. The Hartford's knowledge is concisely demonstrated in an internal document prepared by IIP personnel within two weeks of the New York Attorney General's October, 2004 lawsuit against Marsh & McLennan ("MMC"). The charges alleged in that complaint included allegations that MMC engaged in bid rigging and steering of contracts for property and casualty insurance to preferred insurance companies in return for u disclosed payments from those insurers, including The Hartford, specifically named in the complaint as a co-conspirator.

95. The internal review commenced by The Hartford's IIP as a result of the MMC complaint acknowledged that "we have marketing and expense reimbursement agreements with some distributors . . . ERA disclosure is left to brokers . . . [although] [w]e do not believe they routinely disclose existence of ERAs."

VIII. THE HARTFORD HAS BOUGHT THE LOYALTY OF THE BROKERS

A. The Brokers are Fiduciaries to the Plans

96. In purchasing an SPGA contract for a retirement plan, the plan sponsor or fiduciary exercises the heavy responsibility of investing enormous assets with an insurance company that will provide long-term financial security to the plan's beneficiaries.

97. Plan sponsors and fiduciaries enlisted and engaged the SPGA brokers to assist in the purchase of this investment. Indeed, brokers are retained to provide unbiased, competent and independent advice on the selection of an insurer, to negotiate the SPGA premium to the lowest price ~~available~~, and to provide each plan sponsor with a free and frank disclosure of all the relevant information necessary to allow the plan sponsor to make the best purchase decision for its beneficiaries. Not surprisingly, the brokers, Dietrich, Brentwood, BCG and USI all have marketed themselves, in essence, as the entities that can provide what the plans essentially lack: the special knowledge, experience, resources and skill to make correct and appropriate choices in purchasing SPGAs.

98. The fiduciary relationship between the SPGA brokers and their clients requires each broker to act solely for the benefit of the plan it is representing and not for itself or some other third party.

99. Communications and agreements between plans and brokers underscore the fiduciary nature of the relationship:

- In a June, 2000 letter to Mount Sinai Medical Center related to its purchase of an SPGA, Brentwood referred to a DOL bulletin advising plan fiduciaries that unless they possess the "necessary expertise" to evaluate critical annuity selection factors, the fiduciary needs to "obtain the advice of a qualified independent expert." Brentwood went on to state that, "[i]n our opinion, by following [Brentwood's recommendation] Mt. Sinai has satisfied this requirement."
- In a June, 2002 Annuity Service Proposal prepared for the American Forest & Paper Association ("AF&PA"), Dietrich "acknowledged" and "accepted" its "role as an independent fiduciary" to the AF&PA's plan.

- In late 2004, BCG, in response to a number of questions posed by the Trustees of Hillcrest Medical Nursing Institute, which was in the process of retaining a broker for the purchase of an SPGA for its plan, stated that the "DOL does not require plan fiduciaries to hire independent experts to assist [in a plan purchase], but it is strongly recommended that they do." BCG went on to emphasize that it "realizes that we are the experts . . ."
- In a November, 2000 letter to the Rogers, Lunt & Bowlen Company Employees' Pension Plan, USI described its role in advising the plan, including its analysis of underwriting requirements, financial reports, contract specifications from each bidding insurer and assisting the plan in making "an informed decision."

100. The Hartford also understands that its SPGA customers should and often do retain the services of a broker with specific knowledge of these investments and the process required to complete the transaction. In fact, The Hartford's interne website for terminal funding investments still recognizes that "a professional knowledgeable about the [annuity purchase process] is brought in and may assist the plan sponsor in making required filings, reviewing the plan's provisions and liabilities and articulating needed data in order to obtain initial bids from insurers." The site goes on to say that once final bids are received from insurers, they are "then analyzed and reviewed by the plan sponsor with the assistance of a broker/consultant."

101. In short, at all times relevant to this Complaint, The Hartford knew that Dietrich, Brentwood, BCG and USI, by virtue of their role in a plan's selection and purchase of an SPGA, owed a fiduciary duty to the plans.

B. ERAs and Consulting Agreements Violated the Brokers' Fiduciary Duty

102. The Hartford's ERAs and consulting agreements saddled the brokers with a conflict of interest that induced the brokers to breach their fiduciary duty and place the interests of The Hartford ahead of their clients' interests.

103. In many cases, the secret payments The Hartford has made to a broker are equal to or larger than (a) the fees paid to the broker by the plan or (b) the disclosed commission paid

* * * *

G. Crown Vantage, Inc.

150. Crown Vantage, Inc. ("Crown") was the former sponsor of a defined benefit pension plan that terminated in the summer of 2001 (Crown filed for Chapter 11 bankruptcy in March, 2000). At the time, Crown was headquartered in Ohio with manufacturing plants located throughout the country, including New Hampshire, Michigan, Massachusetts and Virginia.

151. In July 2001, Crown engaged Dietrich to provide placement services for Crown's purchase of an SPGA. Dietrich and Crown agreed that the successful insurer would pay the broker a commission on a scale that ranged from .15%-25%, depending on the size of the purchase. Among the services Dietrich agreed to perform for Crown pursuant to a written agreement were: (a) interpret the plan specifications and prepare the RFP, (b) work with Crown in determining credit ratings requirements, (c) conduct the bidding "to ensure aggressive quotes" and, (d) negotiate "the most aggressive quote possible from each company."

152. The final three bidders for the Crown placement were: Metropolitan Life Insurance Company ($81,545,000), Principal ($81,625,000) and The Hartford ($84,143,794). On or about October 10, 2001, Crown purchased an SPGA from

The Hartford, the third lowest bidder. That same day, both Dietrich and Crown executed The Hartford's application for annuity, which identified the main terms of the purchase and disclosed a commission of .20%, or $168,287.58. The Hartford's internal pricing documents estimated that its return on equity on the placement would amount to 13.04%.

153. On or about January 28, 2002, Dietrich submitted an "SPGA Expense Voucher" to The Hartford which detailed the "business expenses" Dietrich purportedly had incurred in connection with the Crown placement. The expenses claimed on the voucher totaled $841,437.94, and included $244,017 for "Document Interpretation and Preparation of Bid Specifications", "Payroll Expenses" of $151,458.83, and $126,215.69 for "Credit Research & Documentation". These "services" and others itemized on the voucher, were essentially the same services that Dietrich had agreed to provide to Crown in return for the agreed-upon commission. Moreover, the entire $841,437.94, which The Hartford secretly paid Dietrich for its winning the Crown placement, was priced into the final premium. Thus, without knowing it, Crown paid twice for the same services.

H. Research Corporation

154. On or about October, 2002, Research Corporation ("Research"), located in Tucson, Arizona, began the search for a broker to use in connection with the termination of its defined benefit pension plan. In a letter to Brentwood's Ronco, Research asked a series of questions to assist the company in choosing an appropriate broker. Among the questions posed to Brentwood was a description of "the way you are compensated" for the services Brentwood would provide to Research.

155. In his October 22, 2002 written response to Research, Ronco promoted his company as the "Brentwood Difference" and represented that Brentwood would "aggressively nego-

tiate the lowest possible price" and fulfill its "fiduciary obligation" by "choosing the annuity provider that best serves the interests of the participants and beneficiaries." In response to Research's request for information on the manner in which Brentwood is compensated, Ronco indicated that "[w]e can be compensated in one of two ways, a direct fee from [Research] or a commission from the winning carrier." Ronco went on to recommend a "flat fee of $18,000".

APPENDIX E

Agreement Among the Attorney General of the State of Connecticut and the Attorney General of the State of New York, and The Hartford Financial Services Group, Inc. and its subsidiaries and affiliates (collectively "Hartford") dated May 10, 2006

WHEREAS, the Connecticut Attorney General has commenced an action against The Hartford Financial Services Group, Inc. and Hartford Life, Inc. pursuant to the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. (§§ 42-110a et seq.) dated May 10, 2006 (the "Connecticut Complaint") related to Hartford's practices in the marketing, sale, or placement of terminal and maturity funding single premium group annuity contracts to pension plan sponsors ("Terminal/Maturity Funding Group Annuity(ies)") and has conducted an investigation related thereto (the "Connecticut Attorney General's Investigation");

WHEREAS, the New York Attorney General has commenced an action against The Hartford Financial Services Group, Inc. and Hartford Life, Inc. pursuant to Executive Law § 63 (12) and the common law of the State of New York dated May 10, 2006 (the "New York Complaint") related to Hartford's practices in the marketing, sale, or placement of Terminal/Maturity Funding Group Annuity(ies) to pension plan sponsors and has conducted an investigation related thereto (the "New York Attorney General's investigation");

WHEREAS, the Connecticut and New York Attorneys General have alleged that Hartford unlawfully deceived its Terminal/Maturity Funding Group Annuity pension plan customers by: (a) participating in schemes to steer business to Hartford; and (b) providing false information to Hartford's Terminal/Maturity Funding Group Annuity pension plan customers regarding the compensation paid to brokers of Terminal/Maturity Funding Group Annuity(ies);

WHEREAS, without admitting or denying any claim in the Complaints, Hartford is entering into this Agreement prior to any court making any findings of fact or conclusions of law pursuant to any allegations by the Attorneys General;

WHEREAS, Hartford has been and is continuing to cooperate with the investigations being conducted by the Connecticut Attorney General and the New York Attorney General (collectively the "Attorneys General");

WHEREAS, in the wake of the Attorneys General's Investigations, Hartford has agreed under this Agreement (the "Agreement") to implement a number of business reforms;

WHEREAS, nothing herein shall be construed to apply to any business or operations other than Terminal/Maturity Funding Group Annuity(ies);

WHEREAS, the Attorneys General and Hartford wish to enter into this Agreement to resolve all issues related to Hartford raised to date in the Connecticut Attorney General's Investigation and the New York Attorney General's Investigation;

WHEREAS, the Attorneys General find the relief and agreements contained in this Agreement appropriate and in the public interest, and are willing to accept this Agreement as a settlement of the Connecticut Attorney General's Complaint and Investigation and the New York Attorney General's Complaint and Investigation;

WHEREAS, this Agreement is entered into solely for the purpose of resolving the Complaints and is not intended to be used for any other purpose; and

NOW THEREFORE, Hartford and the Attorneys General hereby enter into this Agreement with a statement of apology attached as Exhibit 1, and agree as follows:

MONETARY RELIEF

A. Terminal/Maturity Funding Group Annuity Fund

1. On or before May 19, 2006, Hartford shall pay $16,100,000 into a fund (the "Terminal/Maturity Funding Group Annuity Fund") created and held by Hartford to be paid to Hartford's pension plan customers that purchased Hartford's Terminal/Maturity Funding Group Annuity(ies) during the period from January 1, 1998 through December 31, 2004 using either Brentwood Asset Advisors, LLC, or USI Consulting Group, or Dietrich & Associates, or BCG Terminal Funding Company, or those brokers' or consultants' predecessors, as their broker or consultant, and at the time of the sale, their broker or consultant had an expense reimbursement or other production-based incentive agreement, including but not limited to a consulting agreement or marketing allowance agreement, with Hartford and (i) the sale resulted in a payment to the broker or consultant pursuant to the expense reimbursement or other production-based incentive agreement, or (ii) an amount reflecting the payment for an expense reimbursement or other production-based incentive agreement was added to the premium but not otherwise paid to the broker or consultant or (iii) the sale was credited toward achieving a threshold to obtain such payment under such an agreement (the "Eligible Customers"). All of the money paid into the Terminal/Maturity Funding Group Annuity Fund and any investment or interest income earned thereon shall be paid to Eligible Customers pursuant to this Agreement. No portion of the Terminal/Maturity Funding Group Annuity Fund shall be considered a fine or a penalty.

2. The Terminal/Maturity Funding Group Annuity Fund shall be invested in a designated money market fund subject to the prior approval of the Attorneys General.

3. Hartford shall (a) by June 9, 2006 calculate the amount of money each of the Eligible Customers paid for Terminal/

Maturity Funding Group Annuity(ies) with inception dates during the period from January 1, 1998 through December 31, 2004 using either Brentwood Asset Advisors, UST Consulting, Dietrich & Associates, or BCG Terminal Funding or those brokers' or consultants' predecessors as their broker or consultant where at the time of the sale, their broker or consultant had an expense reimbursement or other production-based incentive agreement, including but not limited to a consulting agreement or marketing allowance agreement, with Hartford and (i) the sale resulted in a payment to the broker or consultant pursuant to the expense reimbursement or other production-based incentive agreement, or (ii) an amount reflecting the payment for an expense reimbursement or other production-based incentive agreement was added to the premium but not otherwise paid to the broker or consultant or (iii) the sale was credited toward achieving a threshold to obtain such payment under such an agreement (the "Eligible Annuities"); (b) within ten days of completing these calculations, file a report with the Attorneys General, certified by an officer of Hartford, setting forth: (i) each Eligible Customer's name and address; (ii) the Eligible Customer's Eligible Annuity(ies) (by group annuity number(s)); (iii) the amount the Eligible Customer paid in premiums for each Eligible Annuity; and (iv) the amount each Eligible Customer is eligible to receive from the Terminal/Maturity Funding Group Annuity Fund, which shall equal each Eligible Customer's pro rata share of the Terminal/Maturity Funding Group Annuity Fund as calculated by multiplying the amount in the Terminal/Maturity Funding Group Annuity Fund by the ratio of the Eligible Customer's total paid premium for Eligible Annuity(ies), divided by the total paid premium for all Eligible Annuities; and (c) by July 10, 2006, send a notice to each Eligible Customer, setting forth the items in (b)(ii) through (iv), above, and stating that the amount paid may increase if there is less than full participation by Eligible Customers in the Terminal/Maturity

Funding Group Annuity Fund (the "Annuity Notice"). The form of the Annuity Notice shall be subject to the prior approval of the Attorneys General.

4. In the event impediments arise with respect to the identification of Eligible Customers, or the distribution from the Terminal/Maturity Funding Group Annuity Fund to a particular Eligible Customer, both the Attorneys General and Hartford agree to use their best efforts to achieve the parties' stated intention to distribute to each Eligible Customer their pro rata share of the Terminal/Maturity Funding Group Annuity Fund. Any amounts not distributed to Eligible Customers, despite the best efforts of the parties, shall be distributed to Participating Customers, as defined in paragraph 5, consistent with paragraph 9 of this Agreement

5. Eligible Customers who receive an Annuity Notice and who voluntarily elect to receive a cash distribution (the "Participating Customers") shall tender a release in the form attached hereto as Exhibit 2 on or before November 7, 2006.

6. On or before November 22, 2006, Hartford shall pay each Participating Customer the amount that that Participating Customer is eligible to receive from the Terminal/Maturity Funding Group Annuity Fund as set forth in paragraph 3(b)(iv) above, and any interest or investment income earned thereon.

7. On or before December 7, 2006, Hartford shall file an interim report with the Attorneys General, certified by an officer of Hartford, listing all amounts paid from the Terminal/Maturity Funding Group Annuity Fund.

8. In the event that any Eligible Customer elects not to participate or otherwise does not respond to the Annuity Notice (the "Non-Participating Customers"), the amount that such policyholder was eligible to receive from the Terminal/Maturity Funding Group Annuity Fund as set forth in paragraph 3(b)(iv) may, up until January 6, 2007, be used by

Hartford to satisfy any pending or other claims asserted by Non-Participating Customers relating to the Terminal/ Maturity Funding Group Annuity allegations, set forth in the Complaints, provided that: a) in no event shall a distribution be made from the Terminal/Maturity Funding Group Annuity Fund to any Non-Participating Customer until all Participating Customers have been paid the full aggregate amount set forth in paragraph 3(b)(iv) above, and any interest or investment income earned thereon; and b) in no event shall the total payments from the Terminal/Maturity Funding Group Annuity Fund to any Non-Participating Customer exceed 80% of the amount that Non-Participating Customer was originally eligible to receive as set forth in paragraph 3(b)(iv).

9. If any money remains in the Terminal/Maturity Funding Group Annuity Fund as of January 6, 2007 after distribution as provided in paragraphs 6 and 8, any such funds shall be distributed by January 22, 2007 on a pro rata basis to the Participating Customers.

10. In no event shall any of the money in the Teminal/ Maturity Funding Group Annuity Fund or the investment or interest income earned thereon be used to pay or be considered in the calculation of attorneys' fees.

11. In no event shall any of the money in the Terminal/ Maturity Funding Group Annuity Fund or the investment or interest income earned thereon be used to pay or be considered in the calculation of commissions, administrative or other fees to Hartford.

12. On or before. February 5, 2007, Hartford shall file a report with the Attorneys General, certified by an officer of Hartford, listing all amounts paid from the Terminal/Maturity Fu[illegible]g Group Annuity Fund, including any payments subsequ[illegible]o the payments described in paragraph 6.

B. Fine and Penalty

13. On or before May 19, 2006, Hartford shall pay $1,950,000 as a penalty, by wire transfer to the State of Connecticut.

14. On or before May 19, 2006, Hartford shall pay $1,950,000 as a fine, by wire transfer to the State of New York.

BUSINESS REFORMS

15. Within 60 days of the date of this Agreement, Hartford shall undertake the following business reforms. Hartford will not undertake any transaction for the purpose of circumventing the prohibitions contained in this Agreement.

16. For purposes of this Agreement, Compensation shall mean anything of material value given to a Producer[1] including, but not limited to, money, credits, loans, forgiveness of principal or interest, vacations, prizes, gifts or the payment of employee salaries or expenses, provided that Compensation shall not mean customary, non-excessive meals and entertainment expenses. Hartford shall develop and implement policies for its relevant employees explaining the provisions of this paragraph as part of the written standards described in paragraph 25 below. Prior to July 10, 2006, Hartford shall submit to the Attorneys General a draft of the intended policies for their approval.

* * * *

[1] For purposes of this Agreement, "Producer" shall mean any insurance broker as that term is defined in § 2101(c) of the Insurance Law of the State of New York who sells, places or consults with clients respecting Terminal/Maturity Funding Group Annuities or any independent insurance agent as that term is defined in § 2101(b) of the Insurance Law of the State of New York and who offers Terminal/Maturity Funding Group Annuities from more than one insurer or affiliated group of insurers.

EXHIBIT 1

The Hartford apologizes to our single premium group annuity pension plan customers for the conduct that led to the actions filed by the Connecticut and New York Attorneys General. It was wrong to withhold from our pension plan customers the full amount of compensation paid to brokers in connection with the placements of these annuities. As part of the settlements, The Hartford has agreed not to pay contingent compensation for single premium group annuities.

Supreme Court, U.S.
FILED
MAR 5 - 2007
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(7)

No. 05-1448

In the Supreme Court of the United States

JEFFREY H. BECK, LIQUIDATING TRUSTEE OF THE ESTATES OF CROWN VANTAGE, INC., AND CROWN PAPER COMPANY, PETITIONER

v.

PACE INTERNATIONAL UNION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an employer that sponsors and administers a single-employer defined benefit plan has a fiduciary obligation under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, to consider merger as a way to implement the employer's decision to terminate the plan.

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Chait v. *Bernstein*, 835 F.2d 1017 (3d Cir. 1988) 28
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Waller v. *Blue Cross*, 32 F.3d 1337 (9th Cir. 1994) 6

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Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780:
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Single-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, § 11008, 100 Stat. 244 23
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26 U.S.C. 4975 14
28 U.S.C. 402(c) (2000 & Supp. IV 2004) 12
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Section 1.414(*l*)-1(b)(1) 19, 21a
Section 1.414(*l*)-1(b)(2) 15, 19, 22a

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Section 4041.28(c)(3) 17, 29a
Section 4041.31 3
Section 4044.4(a) 21, 30a

Miscellaneous:

Black's Law Dictionary (8th ed. 2004) 18, 22
George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* (rev. 2d ed. 1993) 12, 18, 19
DOL, *Field Assistance Bulletin 2002-2* (Nov. 4, 2002) <http://www.dol.gov/ebsa/regs/fab_2002-2html> 14
60 Fed. Reg. 12,328 (1995) 17
<http://www.pbgc.gov/workers-retirees/find-your-pension-plan/content/page789.html> 29
National Conference of Commissioners, *Uniform Trust Code* (2005) 12

Miscellaneous—Continued: Page

PBGC, *Annual Management Report, Fiscal Year 2006* (Nov. 15, 2006) <http://www.pbgc.gov/docs/PBGCAMR.pdf> 29

PBGC Op. Ltr.:

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Random House Dictionary of the English Language (2d ed. 1987) 18

Restatement (Second) of the Law of Trusts (1959) 12, 15, 19

Restatement (Third) of the Law of Trusts (2003) 12

Webster's Third New International Dictionary (1993) 18, 22

In the Supreme Court of the United States

No. 05-1448

JEFFREY H. BECK, LIQUIDATING TRUSTEE OF THE ESTATES OF CROWN VANTAGE, INC., AND CROWN PAPER COMPANY, PETITIONER

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether an employer that sponsors and administers a single-employer defined benefit plan has a fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA or the Act), 29 U.S.C. 1001 *et seq.*, to consider merger as a way to implement the employer's decision to terminate the plan. The Department of Labor (DOL) is responsible for interpreting and enforcing the fiduciary duty provisions in Title I of ERISA, 29 U.S.C. 1103-1106, and the Pension Benefit Guaranty Corporation (PBGC) is responsible for interpreting and enforcing the plan termination provisions in Title IV of ERISA, 29 U.S.C. 1301-1461. In response to an invitation from the Court, the United States filed an amicus brief in this case at the petition stage.

STATEMENT

1. ERISA sets minimum standards for employee benefit plans to ensure their equitable character and financial soundness. 29 U.S.C. 1001(a). Among those standards are requirements that plan fiduciaries discharge their duties solely in the interest of plan participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries, with prudence, and in accordance with the documents and instruments governing the plan insofar as they are consistent with ERISA. 29 U.S.C. 1104(a)(1)(A), (B) and (D). In general, a person is a fiduciary "to the extent" he exercises "any authority or control" over plan "assets" or has "discretionary authority or discretionary responsibility" in the plan's "administration." 29 U.S.C. 1002(21)(A)(i) and (iii).

One kind of pension plan governed by ERISA is a defined benefit plan. 29 U.S.C. 1002(35). In a defined benefit plan, employees are entitled, upon retirement, to fixed periodic payments. See *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 439 (1999). To ensure the availability of sufficient funds to make those payments, ERISA sets minimum funding standards for defined benefit plans. 29 U.S.C. 1001(c), 1081(a), 1082. Title IV of ERISA, 29 U.S.C. 1301 *et seq.*, also provides an insurance program, administered by the PBGC, to protect plan participants and beneficiaries from loss of certain promised benefits upon plan termination. See 29 U.S.C. 1001(c); *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 361-362 (1980).

An employer may initiate termination of a single-employer defined benefit plan covered by Title IV of ERISA "only" through "standard" or "distress" termination procedures. 29 U.S.C. 1341(a)(1). This case concerns a standard termination. In a standard termination, the plan administrator must provide advance notice to affected parties, actuarial information indicating to the PBGC that the plan's assets will be sufficient to satisfy benefit liabilities, subsequent notice to each participant and beneficiary of the amount of benefit liabilities attrib-

utable to him or her, and additional information required by PBGC regulations. 29 U.S.C. 1341(a)(2), (b)(1)(A) and (B), (b)(2); 29 C.F.R. 4041.23-4041.27. The PBGC then decides whether the plan has sufficient assets to satisfy all benefit liabilities and whether other requirements have been met. 29 U.S.C. 1341(b)(2)(C); 29 C.F.R. 4041.31. If the PBGC does not issue a notice of noncompliance, and if the plan assets are sufficient to satisfy benefit liabilities on the distribution date, the plan administrator makes a final distribution of plan assets. 29 U.S.C. 1341(b)(2)(D); 29 C.F.R. 4041.28.

Under 29 U.S.C. 1341(b)(3)(A), the plan administrator must "distribute" the assets of the plan "in accordance with" 29 U.S.C. 1344, which directs the administrator to allocate the assets "among the participants and beneficiaries of the plan" in a specified order of priority. 29 U.S.C. 1344(a). If assets are left over after benefits are satisfied, any assets attributable to employee contributions must be distributed to the participants who made the contributions or to their beneficiaries. 29 U.S.C. 1344(d)(3). After that distribution, the employer sponsoring the plan may recover any residual assets if the plan so provides and the distribution does not violate any law. 29 U.S.C. 1344(d)(1); see *Mead Corp.* v. *Tilley*, 490 U.S. 714, 717-718 (1989). To distribute assets, the plan administrator must either "purchase irrevocable commitments from an insurer"—*i.e.*, annuities—"to provide all benefit liabilities under the plan," or, "in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan." 29 U.S.C. 1341(b)(3)(A).[1]

The PBGC's regulations similarly require the plan administrator, "in accordance with all applicable requirements un-

[1] An "[i]rrevocable commitment" is "an obligation by [a state-licensed insurance company] to pay benefits to a named participant or surviving beneficiary, if the obligation cannot be cancelled under the terms of the insurance contract (except for fraud or mistake) without the consent of the participant or beneficiary and is legally enforceable by the participant or beneficiary." 29 C.F.R. 4001.2.

der the [Internal Revenue] Code and ERISA," to "distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer or in another permitted form." 29 C.F.R. 4041.28(c)(1). The regulations stress that "[a] plan administrator violates ERISA if plan assets are allocated or distributed upon plan termination in a manner other than that prescribed in [29 U.S.C. 1344]." 29 C.F.R. 4044.4(a). The regulations also impose various other requirements, including that the plan administrator inform each participant and beneficiary that, after distribution of plan assets, "the PBGC no longer guarantees that participant's or beneficiary's plan benefits." 29 C.F.R. 4041.23(b)(9).

2. a. Crown Vantage, Inc., and its subsidiary Crown Paper Co. (collectively Crown) operated paper mills in the eastern United States. Pet. App. 4. Crown's board of directors served as administrator of Crown's pension plans. *Ibid.* Respondent PACE International Union (PACE) represented employees covered by 17 of the plans. *Id.* at 5.

In March 2000, Crown filed for bankruptcy and began liquidating its assets. Pet. App. 4. In July 2001, its board of directors began to consider terminating its pension plans under a standard termination through the purchase of annuities. *Ibid.* PACE proposed that Crown instead merge the plans covering employees represented by PACE with the PACE Industrial Union Management Pension Fund (PIUMPF), a multiemployer plan. *Id.* at 5; see 29 U.S.C. 1002(37), 1301(a)(3) (defining "multiemployer plan"). Crown's board declined that proposal and proceeded to terminate 12 of the plans (which, by then, had been merged into a single plan) by purchasing annuities.[2] Crown paid $84 million for the annuities, anticipating that, after termination and distribution of the annuity contracts to participants and beneficiaries, approximately $5 million would revert to Crown. Pet. App. 5-7.

[2] The remaining plans are not at issue in this case.

b. After Crown purchased the annuities, respondents PACE and two plan participants brought an adversary action against Crown in bankruptcy court. Pet. App. 7; see 28 U.S.C. 157. Respondents alleged that Crown had breached its fiduciary duties under ERISA by failing to give adequate consideration to PACE's merger proposal. Pet. App. 7.

The bankruptcy court agreed with respondents that Crown had breached its fiduciary duties. Pet. App. 51-73. The court acknowledged that the board of directors' decision to terminate the plan was a "business" rather than a fiduciary decision. *Id.* at 65. The court nonetheless reasoned that the decision whether to "annuitize" the plans or to merge them into PIUMPF was a fiduciary decision. *Id.* at 66. And the court found that the board did not seriously consider the proposed merger with PIUMPF. *Id.* at 65.

The court did not, however, order Crown to cancel the annuity purchase, because that would have triggered a $4 million penalty for breach of the purchase agreement. Pet. App. 61, 66-67. Instead, the court issued a preliminary injunction preventing Crown from recovering the $5 million in surplus plan assets remaining after the annuity purchase. *Ibid.* In later decisions, the court kept that injunction in effect, but approved termination of the plan and distribution of the residual assets to the participants and beneficiaries. *Id.* at 74-83. The distribution of the residual assets was stayed pending resolution of any appeals. See Pet. 9.

c. Petitioner, the liquidating trustee of the Crown bankruptcy estates, appealed to the district court. Pet. App. 29-50. The district court rejected petitioner's argument that the decision to terminate the plan by purchasing annuities rather than to merge the plan with PIUMPF was a business, not a fiduciary, decision. *Id.* at 45-46. The court held that merger is an alternative method, permitted by ERISA, of implementing a plan termination because a merger can "otherwise fully provide all benefit liabilities under the plan." *Id.* at 46 (quoting 29 U.S.C. 1341(b)(3)(A)(ii)). And the court rejected peti-

tioner's contention that the terms of the Crown plan did not authorize merger as a means of termination. *Id.* at 47-48.

d. Petitioner appealed, and the Ninth Circuit affirmed the district court's judgment in relevant part. Pet. App. 1-24. The court of appeals acknowledged that "the decision to terminate a pension plan is a business decision not subject to ERISA's fiduciary obligations." *Id.* at 9. The court stated, however, that "the *implementation* of a decision to terminate is discretionary in nature and subject to ERISA's fiduciary obligations." *Ibid.* (citing *Waller* v. *Blue Cross*, 32 F.3d 1337, 1342-1344 (9th Cir. 1994)). The court then reasoned that whether Crown breached its fiduciary duty turns on whether merger was a permissible means of implementing the decision to terminate the plan. *Ibid.* The court concluded that it was. The court construed 29 U.S.C. 1341(b)(3)(A) and 29 C.F.R. 4041.28(c)(1) to permit any method of termination that is "sufficient to cover plan liabilities," Pet. App. 12, and concluded that merger was such a method, *id.* at 14. The court rejected petitioner's arguments that merger is a procedure distinct from termination and that merging the Crown plan into PIUMPF would not "distribute" plan assets as required by Section 1341(b)(3)(A). *Id.* at 12-14. The court refused to consider whether the terms of the Crown plan permitted merger as a means of termination, because Crown had not raised that issue in the bankruptcy court. *Id.* at 10.

Finally, the court concluded that Crown breached its fiduciary duty to act solely in the interest of plan participants and beneficiaries by failing to undertake an intensive and scrupulous investigation of the proposed PIUMPF merger as an alternative to the purchase of annuities. Pet. App. 15-20. In a separate, unpublished opinion, the court upheld the distribution of residual plan assets ordered by the bankruptcy court as a remedy for Crown's fiduciary breach. *Id.* at 25-28.

e. Petitioner sought rehearing and rehearing en banc. The PBGC and the DOL filed amicus briefs in support of peti-

tioner's request, but the court of appeals denied further review. Pet. App. 84-85.

SUMMARY OF ARGUMENT

A. The court of appeals erroneously held that ERISA's fiduciary duties apply to an employer's decision whether to terminate a pension plan by purchasing annuities or instead to merge the plan with another plan. This Court has repeatedly recognized that an employer acts as a settlor, not a fiduciary, when making decisions about plan design, composition, and structure—including decisions whether to adopt, modify, or terminate a plan. The distinction between fiduciary and settlor functions follows from ERISA's provision that a person is a plan fiduciary only "to the extent" he performs specified functions. Those functions—which include plan administration, plan management, and control or disposition of plan assets—are analogous to a trustee's traditional duties at common law. In contrast, employer decisions about plan design, composition, and structure are analogous to decisions traditionally made by a trust settlor. The statutory distinction between fiduciary and settlor functions gives effect to ERISA's purposes of encouraging but not requiring the formation of plans, ensuring that plan participants and beneficiaries receive promised benefits, and preserving an employer's ability to act in its own business interests in deciding whether to create, modify, or terminate a plan.

The holding of the court of appeals is inconsistent with the established distinction between fiduciary and settlor functions. The decision whether to terminate a plan and the decision whether to merge a plan with another plan are each settlor functions, because they are choices about plan design, composition, and structure. Because both decisions, considered separately, are settlor functions, the choice to pursue one course rather than the other is also a settlor, rather than a fiduciary, decision.

B. The court of appeals also erred in holding that merger is a permissible means of plan termination. ERISA's text makes clear that merger is not a method of plan termination. The Act requires the plan administrator to distribute the assets of the terminating plan among the participants and beneficiaries of the plan in a specified order of priority. In a merger, however, the assets of the merging plan are not distributed among the participants and beneficiaries of that plan at all. Instead, the assets are transferred to the plan created by the merger, where they are commingled and used to provide benefits to all the participants and beneficiaries of that new plan. In addition, ERISA provides that an employer may, in certain circumstances, obtain a reversion of surplus plan assets following a termination. But, in a merger, employers have no possibility of receiving a reversion.

The PBGC's termination regulations also establish that merger is not a permissible means of distributing plan assets in a termination. The regulations require distribution in accordance with ERISA and in satisfaction of all plan benefits. In a merger, however, those requirements are not met. The regulations also require that participants and beneficiaries be informed that distribution extinguishes the PBGC's guarantee of benefits. That guarantee is not extinguished by a merger, however, because the PBGC continues to guarantee benefits under the merged plan.

The structure of ERISA confirms that merger is not a method of plan termination. ERISA treats merger and termination as distinct procedures, which are addressed in separate statutory sections and are subject to different requirements.

C. The holding of the court of appeals, if affirmed, would frustrate the purposes of ERISA. It would restrict the ability of an employer to recover residual assets from an over-funded plan or to cease maintaining an ERISA-covered plan, and thereby remove itself from regulation under the Act. That result would undermine ERISA's goals of encouraging plan formation and promoting adequate funding of plans. Impos-

ing a fiduciary duty on employers to consider merger as a way of terminating their plans would also increase the risk that plan participants and beneficiaries would not receive their full benefits, because merger provides less benefit security than the purchase of annuities upon plan termination. And it would also increase the exposure of the PBGC's insurance program. The PBGC would be liable for losses to individuals covered by merged plans for which its guarantee obligation would otherwise have been extinguished upon termination of the plans.

ARGUMENT

AN EMPLOYER DOES NOT HAVE A FIDUCIARY OBLIGATION TO CONSIDER MERGER AS A MEANS OF TERMINATING A DEFINED BENEFIT PENSION PLAN

The court of appeals erroneously held that ERISA imposes a fiduciary obligation on an employer that sponsors and administers a defined benefit plan to consider merger as a way to implement the employer's decision to terminate the plan. That unprecedented holding misconstrues ERISA in two fundamental ways. First, it fails to recognize that an employer's choice between terminating a plan and merging the plan with another plan is a settlor rather than a fiduciary act. Second, it rests on the mistaken premise that merger is a permissible method of terminating a defined benefit plan.

A. An Employer Acts As A Settlor, Rather Than A Fiduciary, In Deciding Whether To Terminate A Pension Plan Or To Merge It With Another Plan

1. ERISA draws a fundamental distinction between settlor and fiduciary actions

Under ERISA, an employer, like Crown, that establishes or maintains a single-employer employee benefit plan is the plan sponsor. 29 U.S.C. 1002(16)(B)(i). The employer may also choose to act as administrator of the plan. See 29 U.S.C. 1002(16)(A); *Varity Corp.* v. *Howe*, 516 U.S. 489, 498 (1996).

But ERISA draws a fundamental distinction between the employer's actions in those two capacities. When the employer acts as plan administrator, or otherwise exercises authority over the management or disposition of plan assets, the employer acts as a plan fiduciary. Its actions are therefore subject to ERISA's requirement that plan fiduciaries act solely in the interest of plan participants and beneficiaries, with prudence, and in accordance with plan documents insofar as they are consistent with ERISA. In contrast, when the employer acts as plan sponsor—making decisions about the design, composition, or structure of the plan—the employer acts as the settlor of the plan. The employer is not subject to ERISA's fiduciary obligations and may instead make its decisions based on business considerations.

a. This Court has repeatedly recognized the basic distinction between settlor and fiduciary functions. The Court first discussed the distinction in *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73 (1995), which held that a provision in a welfare plan stating that the sponsor could amend the plan at any time was valid under ERISA Section 402(b)(3), 88 Stat. 875 (29 U.S.C. 1102(b)(3)). In reaching that conclusion, the Court noted that "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." 514 U.S. at 78. The Court explained that employers do not act as fiduciaries when taking those actions. *Ibid.*

The Court applied that principle to a pension plan in *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996). *Spink* held that the employer did not breach any fiduciary duty under ERISA when it amended its retirement plan for business reasons. *Id.* at 889-891. Relying on *Curtiss-Wright*, the Court stated that "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." *Id.* at 890. The Court explained that "amending or terminating a plan" involves "plan design" rather than "plan 'management' or 'administration.'" *Ibid.* (citations omitted).

The Court provided further elaboration in *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432 (1999). In that case, the Court held that claims that Hughes breached its fiduciary duties in amending its pension plan were "directly foreclosed by *Spink*'s holding that, without exception, '[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries.'" *Id.* at 445 (quoting *Spink*, 517 U.S. at 890). The Court explained that, "[i]n general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets." *Id.* at 444. Thus, "ERISA's fiduciary duty requirement simply is not implicated where" an employer, acting as a plan's "settlor, makes a decision regarding the form or structure of the [p]lan." *Ibid.*

b. The distinction between settlor and fiduciary acts follows from ERISA's definition of fiduciary. See *Spink*, 517 U.S. at 890. As relevant here, ERISA provides that a person is a plan fiduciary "to the extent * * * he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets," or "has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. 1002(21)(A)(i) and (iii). Although those terms are not defined in ERISA, they have a traditional meaning under the law of trusts, and ERISA generally uses them in accordance with that traditional common-law meaning. See *Pegram* v. *Herdrich*, 530 U.S. 211, 224 (2000); *Varity*, 516 U.S. at 502.

"At common law, fiduciary duties characteristically attach to decisions about managing assets and distributing property to beneficiaries." *Pegram*, 530 U.S. at 231. Fiduciary "administration" means "to perform the duties imposed, or exercise the powers conferred, by the trust documents." *Varity*, 516 U.S. at 502. The general rule at common law was therefore that a trustee could exercise only those powers that were

conferred by the terms of the trust or that were necessary and appropriate to carry out the purposes of the trust and were not forbidden by its terms. Restatement (Second) of the Law of Trusts § 186, at 399 (1959) (Restatement); see George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 541, at 161-162 (rev. 2d ed. 1993) (Bogert). ERISA similarly requires a plan fiduciary to discharge his duties "in accordance with the documents and instruments governing the plan insofar as * * * [they] are consistent with [ERISA]." 29 U.S.C. 1104(a)(1)(D).

In contrast to a trust's fiduciary, the settlor creates the trust and sets its terms. Restatement §§ 3, 4. The settlor may retain broad authority to revoke or to modify the trust. *Id.* §§ 330, 331; Bogert § 993, at 230-231; *id.* § 1000, at 307. ERISA plan sponsors who alter the terms of a plan or revoke the plan by terminating it are thus "analogous to the settlors of a trust" and "do not act as fiduciaries." *Spink*, 517 U.S. at 890 (citations omitted).[3]

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[3] The Restatement (Third) of the Law of Trusts, adopted by the American Law Institute in 2003, contains a new provision that states that a "trustee may divide a trust into two or more trusts or combine two or more trusts into a single trust, if doing so does not adversely affect the rights of any beneficiary or the accomplishment of the trust purposes." Restatement (Third) of the Law of Trusts § 68, at 531 (2003). That provision represents a departure from the traditional common law rule described in the Second Restatement. See *id.*, Reporter's Notes on § 68, at 533. The new provision therefore does not shed light on the correct construction of ERISA's definition of fiduciary, which was enacted many years earlier against the backdrop of the traditional common law rule, as expressed in the Second Restatement. Moreover, the new provision does not authorize the type of merger at issue here. The commentary explains that the new provision does not authorize a trustee to combine a trust with another trust "where the interests of beneficiaries will be materially altered." *Id.*, cmt. a, at 532. The merger proposed by PACE would have materially altered the interests of the beneficiaries of the Crown plan by, among other things, exposing the assets of the Crown plan to the benefit claims of the beneficiaries and participants of the PIUMPF. Cf. *id.*, Illustration, at 532-533 (giving, as an example of an authorized combination, the combination of two trusts with identical beneficiaries and identical terms); see also National

c. The limitations on the scope of ERISA's fiduciary duties reflect the Act's basic premises and purposes. ERISA does not require employers to create benefit plans or to provide any particular kind or level of benefits. See *Spink*, 517 U.S. at 887; *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983). ERISA therefore generally allows employers to decline to adopt, to alter, or to terminate benefit plans for any reason, including the employer's business interests. That freedom permits employers to amend plans to comply with new laws or to streamline their operations, see *Spink*, 517 U.S. at 885, to encourage early retirement, see *Hughes Aircraft*, 525 U.S. at 436, or to provide a single plan for employees after acquiring another company, see *Malia* v. *General Elec. Co.*, 23 F.3d 828, 829-830, 833 (3d Cir. 1994). Moreover, employers may obtain "incidental benefits" from altering a plan, *Hughes Aircraft*, 525 U.S. at 445, including a reversion of surplus assets following plan termination, see *Mead Corp.* v. *Tilley*, 490 U.S. 714, 717-718 (1989).

Instead of requiring employers to create benefit plans, ERISA seeks to *encourage* plan formation, as well as the adequate funding of plans. 29 U.S.C. 1001(a) and (c), 1001a(c), 1001b(c). The freedom that ERISA gives employers to alter and to terminate plans furthers those goals. It reassures employers that they retain substantial authority over the structure of and the benefits provided by the plans that they create. Employers know that, if they fully satisfy their benefit liabilities under a pension plan, they may replace it with another kind of plan or choose to maintain no plan at all. And employers need not hold back in funding their plans because,

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Conference of Commissioners, *Uniform Trust Code* § 417, cmt., at 75 (2005) ("Typically the trusts to be combined will * * * vary on only insignificant details * * * . The more the dispositive provisions of the trusts to be combined differ from each other the more likely that a combination would impair some beneficiary's interest, hence the less likely that the combination can be approved.").

if their plans so provide, they can recover surplus assets by terminating the plans and obtaining reversions.

At the same time, ERISA seeks to ensure that employees receive the benefits that they have been promised by employers. *Spink*, 517 U.S. at 887; *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 375 (1980); 29 U.S.C. 1001, 1001a(c), 1001b(c). ERISA thus requires that decisions about the administration and management of a plan be made solely in the interest of the plan's participants and beneficiaries, for the exclusive purpose of providing benefits to them, with a high degree of prudence, and in accordance with the documents and instruments governing the plan insofar as they are consistent with ERISA. 29 U.S.C. 1104(a)(1). See 29 U.S.C. 1106(a) (categorically prohibiting certain transactions likely to injure the plan); 26 U.S.C. 4975 (parallel Internal Revenue Code provisions). Those strict limitations on fiduciary actions work together with the broad freedom of plan sponsors to amend or to terminate plans in furthering ERISA's basic goals.[4]

2. *The choice between terminating a plan and merging it with another plan is a settlor, rather than a fiduciary, decision*

a. The court of appeals' holding that an employer has an obligation to consider merging its pension plan with another plan instead of terminating the plan by purchasing annuities cannot be squared with the distinction between settlor and fiduciary actions. An employer's decision whether to termi-

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[4] When a plan is established or maintained by two or more employers or by one or more employers and employee organizations, the "plan sponsor" is "the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan." 29 U.S.C. 1002(16)(B)(iii). The activities of a joint board are not at issue here, but the DOL has stated that, unless the relevant plan documents contemplate that the board will act as fiduciaries in carrying out activities that would otherwise be settlor in nature, those activities will generally be viewed as settlor activities. DOL, *Field Assistance Bulletin 2002-2* (Nov. 4, 2002), <http://www.dol.gov/ebsa/regs/fab_2002-2.html>.

nate a plan is not a fiduciary function. It "cannot be an action of plan 'management' or 'administration.'" *Spink*, 517 U.S. at 890 (citation omitted). Nor is it taken "in accordance with the documents and instruments governing the plan." 29 U.S.C. 1104(a)(1)(D); cf. Restatement § 186 (fiduciary duty to act in accordance with trust terms). Instead, the decision whether to terminate a plan is a quintessential example of a choice about plan design, composition, and structure. Termination is a fundamental alteration of the plan terms by the elimination of the plan, analogous to a settlor's revocation of an ordinary trust. See *id.* § 330. This Court has therefore repeatedly made clear that the decision to terminate a plan is a settlor action that is not subject to ERISA's fiduciary duties. *Spink*, 517 U.S. at 890; *Curtiss-Wright*, 514 U.S. at 78.

An employer's decision whether to merge a pension plan with another plan is similarly a settlor rather than a fiduciary action, akin to modification of the terms of a trust. See Restatement § 331. A merger is "the combining of two or more plans into a single plan." 26 C.F.R. 1.414(*l*)-1(b)(2). An employer's decision whether to merge a plan with another plan is thus a decision about the design, composition, and structure of the plans. In this case, for example, merger would eliminate the Crown plan's structure and replace it with the separate terms, benefits, and procedures of the PIUMPF. See Pet. App. 32, 57 (noting different features of the PIUMPF). The courts of appeals that have considered the question have therefore correctly concluded that an employer's decision whether to merge a plan is a settlor function that is not subject to ERISA's fiduciary obligations. See *Malia*, 23 F.3d at 833; *Sutter* v. *BASF Corp.*, 964 F.2d 556, 562 (6th Cir. 1992). The courts of appeals have likewise declined to impose fiduciary duties on decisions to make similar plan modifications, such as transferring assets and liabilities between plans or spinning off assets and liabilities to create a new plan. See *Flanigan* v. *General Elec. Co.*, 242 F.3d 78, 87-88 (2d Cir.), cert. denied, 534 U.S. 1065 (2001); *King* v. *National Human*

Res. Comm., Inc., 218 F.3d 719, 723-724 (7th Cir. 2000); *Systems Council EM-3* v. *AT&T Corp.*, 159 F.3d 1376, 1379-1380 (D.C. Cir. 1998). The interests of participants and beneficiaries are protected with respect to settlor decisions to make plan modifications by specific restrictions in ERISA itself and its implementing regulations rather than by ERISA's general fiduciary duties. See pp. 18-22, 24 & n.9, *infra*.

Because an employer's decision whether to terminate a plan and its decision whether to merge a plan with another plan are, considered separately, settlor rather than fiduciary functions, it follows that the choice to pursue one course rather than the other is also a settlor function. That choice is necessarily a decision about plan design, composition, and structure. Moreover, it is wrong to conceive of termination and merger as equivalent alternatives. A decision to terminate a plan has very different consequences than a decision to merge a plan. See pp. 19-20, 24-25, *infra*. The next most likely option for an employer considering termination might be to do nothing at all rather than to pursue the very different course of merger. Thus, Crown's decision whether to terminate its pension plan by purchasing annuities, to merge it with PACE's multiemployer plan, or to do nothing at all was a settlor decision that Crown was free to make for business reasons.

b. The court of appeals mistakenly concluded that Crown had a fiduciary duty to consider merger on the theory that merger was a possible means of implementing Crown's decision to terminate the plan. As discussed below, the court was incorrect in concluding that merger is a method of plan termination. See pp. 17-25, *infra*. Even apart from that error, however, the court was incorrect in concluding that the choice between terminating a plan by purchasing annuities and merging the plan with another plan is a fiduciary decision.

The court of appeals incorrectly analogized that decision to a plan administrator's choosing between two insurance companies to provide annuities upon termination. ERISA

requires a "plan administrator" to purchase annuities as the means of distributing plan assets in a termination unless the plan and PBGC regulations permit another method of distribution. 29 U.S.C. 1341(b)(3)(A). The administrator's choice among potential annuity providers is a fiduciary decision because it involves a discretionary choice about how to expend plan assets. See 29 U.S.C. 1002(21)(A)(i); 60 Fed. Reg. 12,328 (1995). ERISA itself confirms that the decision is a fiduciary one because it assigns responsibility for the decision to the plan administrator, who is, by the very nature of his position, a fiduciary. See 29 U.S.C. 1341(b)(3)(A); 29 C.F.R. 2509.75-8, Q&A D-3. Both the DOL and the PBGC have therefore concluded that ERISA's fiduciary standards apply to the selection of an annuity provider. 29 C.F.R. 2509.95-1, 4041.28(c)(3).

In contrast, an employer's decision whether to merge a plan with another plan is not a choice about how to expend or otherwise manage or administer plan assets. Moreover, unlike the purchase of annuities, ERISA does not assign the decision whether to merge to the plan administrator. Indeed, although ERISA directly addresses who makes that decision only in the context of a merger between multiemployer plans, ERISA expressly assigns the decision to the plan sponsor in that context. 29 U.S.C. 1411(a) and (b). Accordingly, the decision whether to merge two plans is not a fiduciary decision. And it is not transformed into one simply because it is mischaracterized as a method of implementing a plan termination. It remains a settlor function, however it is labeled.

B. Merger Is Not A Permissible Method Of Terminating A Single-Employer Defined Benefit Pension Plan

In addition to its error in treating an employer's decision whether to merge plans as a fiduciary decision, the court of appeals also erred in holding that merger is a permissible method of terminating a defined benefit plan. ERISA's provisions governing plan termination and the PBGC's implementing regulations establish that merger is not a means of accom-

plishing plan termination. Instead, merger is a separate and distinct procedure that plan sponsors may use to alter the structure or composition of a plan.

1. ERISA's text makes clear that merger is not a method of plan termination

As this Court noted in *Hughes Aircraft*, 29 U.S.C. 1341 provides the exclusive means for voluntary termination ofa single-employer defined benefit plan. See 525 U.S. at 446. Section 1341(b), which governs the standard termination involved here, makes clear that merger is not a permissible method of effectuating termination. It states that, in a termination, the plan administrator "shall distribute" the plan assets "in accordance with [29 U.S.C. 1344]." 29 U.S.C. 1341(b)(3)(A). In a merger, plan assets are not "distribute[d]," and the requirements of Section 1344 are not satisfied.

a. "Distribute" means "to divide and give out in shares." *Random House Dictionary of the English Language* 572 (2d ed. 1987). See *Webster's Third New International Dictionary* 660 (1993) (*Webster's*) ("To divide among several or many: deal out: apportion esp. to members of a group or over a period of time."); *Black's Law Dictionary* 508 (8th ed. 2004) (*Black's*) ("To apportion; to divide among several"). Distribution thus contemplates "an apportioning of something among many by separating it into parts" and "assigning each part * * * to its appropriate person or place." *Webster's* 660.

In trust law, distribution connotes the apportionment of the trust assets among, and their delivery to, the trust beneficiaries. See *Black's* 509 (defining "trust distribution" as "cash or other property paid or credited to a trust beneficiary"); Bogert § 814, at 302 (payment should generally be made to the beneficiary personally). "Upon the termination of the trust it is the duty of the trustee to the person beneficially entitled to the trust property to transfer the property to him or, if the trustee has possession but not title, to deliver pos-

session to him." Restatement § 345, at 193; see Bogert § 1010, at 457.

The requirement in Section 1341 that the plan administrator "distribute" the plan assets upon termination thus means that the administrator must divide the assets among the plan participants and beneficiaries and deliver to each his or her respective share. That does not occur when a defined benefit plan is merged with another defined benefit plan. The assets of the merging plan are neither divided among nor delivered to the beneficiaries of that plan. Instead, the assets are transferred en masse to the plan created by the merger, where they are commingled to fund the benefits of the participants in that plan. See 26 C.F.R. 1.414(*l*)-1(b)(1) and (2) (requiring that, following a merger, all of the assets of the merged plan be available to pay benefits to employees who are covered by the plan and their beneficiaries); *Hughes Aircraft*, 525 U.S. at 440 (noting that, in a defined benefit plan, "no plan member has a claim to any particular asset that composes a part of the plan's general asset pool").[5]

b. Because a merger does not result in a distribution of plan assets, a merger also cannot comply with the requirements of Section 1344. That provision requires that the assets of the terminating plan be allocated "among the participants and beneficiaries of the plan" according to a specified order of priority. 29 U.S.C. 1344(a); *Tilley*, 490 U.S. at 717-718 & n.3. Contrary to those requirements, in a merger, the assets of the merging plan are transferred to the new merged plan, where they are commingled and used to satisfy the benefit claims

[5] Section 1341(b)(3)(A) also contains a specific requirement regarding the distribution of plan assets owed to a "missing participant"—"a participant or beneficiary under a terminating plan whom the plan administrator cannot locate after a diligent search." 29 U.S.C. 1350(b)(1). A plan administrator satisfies Section 1341(b)(3)(A) for a missing participant only if the assets that are due to the participant are transferred to the PBGC as "trustee" or used to purchase an annuity. See 29 U.S.C. 1341(b)(3)(A)(ii), 1350(a)(1) and (2). Neither of those options is available in a merger.

not only of the participants and beneficiaries of the merging plan, but also of the other participants and beneficiaries of the plan created by the merger.

Section 1344(d) further provides that, if all benefits are satisfied, there may in some circumstances be a reversion or distribution of residual assets to the employer. See 29 U.S.C. 1344(d)(1) and (3). In a merger, however, there is no possibility of a reversion to the employer. The plan assets are all transferred to the merged plan. And, once the assets are in the merged plan, they are subject to ERISA's anti-inurement rule, which prohibits their use for the benefit of the employer. See 29 U.S.C. 1103(c).

c. The court of appeals failed even to address the provisions of Section 1344. As for the distribution requirement of Section 1341(b)(3)(A), the court of appeals erroneously concluded that the purchase of annuities "does not appear to satisfy the distribution requirement any more than would a merger into a multiemployer plan." Pet. App. 14. The court reasoned that "[b]oth scenarios would involve a series of payments to plan beneficiaries over time, rather than a lump-sum payment at the time of termination." *Id.* at 14-15. That analysis ignores the fact that ERISA itself establishes that the purchase of annuities satisfies the distribution requirement because ERISA specifies it as the primary method of distribution. 29 U.S.C. 1341(b)(3)(A)(i). The court of appeals' analysis also overlooks the fact that the purchase of annuities, unlike a merger, involves the division of plan assets among, and their delivery to, the plan participants and beneficiaries. The annuities are issued in the names of the individual participants and beneficiaries, who enjoy an unfettered, contractually enforceable right to their respective annuities. See 29 C.F.R. 4001.2. In contrast, in a merger, the plan assets are not divided among the individual participants and beneficiaries, and they receive no assets unless and until they are paid benefits under the plan that results from the merger.

2. *The PBGC's regulations do not permit merger as a method of plan termination*

Section 1341(b) requires distribution of the assets of a terminating plan to be accomplished by the purchase of annuities or by "otherwise fully provid[ing] all benefit liabilities" "in accordance with the provisions of the plan and any applicable regulations." 29 U.S.C. 1341(b)(3)(A). Thus, any alternative method of distributing assets must be permitted by the PBGC's regulations. As discussed below, the PBGC does not view its regulations as permitting merger as an alternative method of asset distribution. The PBGC's interpretation of its regulations is reasonable and entitled to deference. See *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); *Boivin* v. *U.S. Airways, Inc.*, 446 F.3d 148, 154 (D.C. Cir. 2006).[6]

The PBGC's regulations require distribution of the assets of a terminating plan "in accordance with all applicable requirements under * * * ERISA," 29 C.F.R. 4041.28(c)(1), and, in particular, the allocation requirements of Section 1344, 29 C.F.R. 4044.4(a). As explained above, merger is not a distribution, and a merger cannot satisfy Section 1344's allocation requirements.

The regulations also require the plan administrator to "distribute plan assets in satisfaction of all plan benefits." 29 C.F.R. 4041.28(c)(1). Consistent with the meaning of "distribute" under trust law, and the requirement that all plan benefits be satisfied, the PBGC interprets that regulatory provision to require that (1) the assets will be divided among the participants and beneficiaries of the terminating plan, and

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[6] As the government noted in its brief at the petition stage, the Crown plan did not permit merger as a means of distributing plan assets in a termination, and the court of appeals erred in concluding that petitioner had forfeited the issue. See U.S. Amicus Br. 13 n.3. Petitioner, however, did not raise that fact-bound issue in his petition for a writ of certiorari, and this Court need not address it, because the case is more appropriately resolved by deciding the legal issues on which the Court granted review.

(2) those participants and beneficiaries will actually receive their benefits, either through an annuity, which is the distribution form authorized by the statute, or through a lump sum payment equal to the present value of the benefits. See *Webster's* 2017 (defining "satisfaction" as "discharge of a legal obligation or settlement of a claim"); *Black's* 1370 (defining "satisfaction" as "fulfillment of an obligation; esp., the payment in full of a debt); 29 C.F.R. 4041.28(c)(1) and (2).[7]

Those criteria are not satisfied in a merger. Instead, as described above, the assets are transferred to the new plan created by the merger, where they are used to provide benefits to other individuals besides the participants and beneficiaries of the merging plan. In addition, participants and beneficiaries do not actually receive their benefits in the form of annuity contracts or cash. Rather, they receive only the promise of future payments from the merged plan—payments which, unlike lump sum distributions or annuities, are contingent on the continued health of that plan.

Other components of the PBGC's regulations reinforce the conclusion that merger is not a permissible method of accomplishing plan termination. For example, the regulations require that the notice of plan termination inform each participant that, after distribution of the plan assets, "the PBGC no longer guarantees that participant's or beneficiary's plan benefits." 29 C.F.R. 4041.23(b)(9). But a merger does not extinguish the PBGC's guarantee. Instead, the PBGC continues to guarantee benefits under the merged plan.

The court of appeals incorrectly concluded that the PBGC's regulations authorize merger as a method of plan termination because they allow distribution of assets in a termination to be effected either by the purchase of annuities

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[7] In order to avoid taxation, a participant or beneficiary who is entitled to a lump sum distribution under the plan may elect to have his or her distribution transferred or "rolled over" into an individual retirement account (IRA) or another qualified plan. 26 U.S.C. 402(c) (2000 & Supp. IV 2004).

"or in another permitted form." 29 C.F.R. 4041.28(c)(1). The phrase "another permitted form" refers to a lump sum cash distribution, if permitted by the plan, or the rollover of such a distribution into an IRA or another qualified plan. The phrase could conceivably encompass a distribution method other than a lump sum payment or rollover if that method were permitted by the relevant plan, ERISA, and the PBGC's regulations. Merger does not meet those criteria.

3. ERISA's structure indicates that merger is not a method of plan termination

The structure of ERISA confirms that merger is not a method of terminating a single-employer plan. ERISA treats merger and termination as distinct procedures. Mergers are addressed in statutory sections separate from those governing terminations. Compare 29 U.S.C. 1058 (mergers generally), 1411 and 1412 (mergers involving multiemployer plans), and 26 U.S.C. 414(*l*) (tax implications of mergers) with 29 U.S.C. 1341 (terminations of single-employer plans) and 1341a (terminations of multiemployer plans).[8]

Moreover, the statutory provisions addressing mergers impose different requirements from those applicable to termi-

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[8] The court of appeals mistakenly reasoned that merger is a method of termination because the provisions governing termination and some provisions governing merger are located in the same title of ERISA—Title IV. See Pet. App. 12-13. That reasoning ignores the fact that the principal ERISA provision governing merger is located in Title I rather than Title IV. See 29 U.S.C. 1058. Moreover, the termination provisions are located in a separate subtitle (Subtitle C) from the Title IV merger provisions (which are located in Part 2 of Subtitle E). And the termination provisions and the Title IV merger provisions were enacted by different laws many years apart. Compare ERISA, Pub. L. No. 93-406, § 4041, 88 Stat. 1020 (enacting original termination provisions), and Single-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, § 11008, 100 Stat. 244 (enacting current termination provisions, subject to some later modifications), with Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 104(2), 94 Stat. 1244 (enacting Title IV merger provisions).

nations. For example, the merger provisions generally require that participants' benefits be no lower after a merger than they were before the merger. See 29 U.S.C. 1058, 1411(b)(2), 1412(b).[9] Those provisions do not, however, give participants the same rights to receive plan assets that the participants have in a plan termination. See, *e.g.*, *Brillinger* v. *General Elec. Co.*, 130 F.3d 61, 63 (2d Cir. 1997), cert. denied, 525 U.S. 1138 (1999), and *Malia*, 23 F.3d at 831-832. In addition, a plan administrator cannot begin a termination without providing notice to the PBGC. The PBGC can then block the termination if it finds that assets will not be sufficient to provide for benefit liabilities. 29 U.S.C. 1341(b)(2)(C) and (D). The PBGC has no comparable authority to block a merger, and it may not even receive notice of a merger until after it is completed. See 29 U.S.C. 1343(a), 1343(c)(8) (requiring notice after merger); compare 29 U.S.C. 1411(b) (advance notice required for merger of multiemployer plans) with 29 U.S.C. 1412 (no advance notice required for merger of single-employer plan into multi-employer plan).

This statutory structure reflects the fact that merger and termination are two fundamentally different actions. Termination ends the plan's existence. Upon completion of a standard termination, the employer has no further obligations under ERISA, and the PBGC's guarantee for the plan ceases. All plan benefits are satisfied, so there is no longer any risk that participants and beneficiaries will not receive their promised benefits because of deterioration in the financial health of the plan. Merger, in contrast, merely transforms the merging plan into a different plan that remains subject to ERISA. The employer does not remove itself from the ERISA framework, and the PBGC continues to guarantee plan benefits. Moreover, whether plan participants and beneficiaries ultimately receive their benefits depends upon the continued

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[9] That same requirement applies to transfers of assets and liabilities. See 29 U.S.C. 1058, 1411(b)(2), 1412(b).

health of the new plan created by the merger. The court of appeals ignored those essential differences in concluding that merger is a method of plan termination.

4. The PBGC opinion letters cited by respondent do not suggest that merger is a method of plan termination

Respondent incorrectly argues (Br. in Opp. 14-17) that three PBGC opinion letters support the court of appeals' holding that merger is a method of terminating a plan. None of the letters—which were issued before the enactment of the current ERISA termination provisions and implementing regulations—supports that holding.

The letters addressed the applicability of 1984 Joint Guidelines issued by the PBGC, the DOL, and the Internal Revenue Service (IRS) to certain transfers of assets and liabilities between plans. The 1984 Guidelines were promulgated to address efforts by employers to reach surplus assets in their pension plans without purchasing annuities for all plan participants and beneficiaries, which the employers would have been required to do if they entirely terminated the plans. In one such scheme, an employer would split a plan into two plans, one for active employees and the other for former employees, including retirees. The employer would then terminate the plan for the former employees and recover a reversion of excess plan assets. See Br. in Opp. App. 8a-9a, 12a-13a. The Guidelines made clear that, in such a spin-off/termination, the PBGC would generally not recognize a termination nor allow the employer to recover surplus assets, unless the employer (among other things) purchased annuity contracts that provided for the accrued benefits of the participants and beneficiaries of both the terminating plan and the ongoing plan. See Br. in Opp. App. 2a-4a (1984 Guidelines).

Two of the opinion letters involved an employer that had split a plan into two plans, each covering a separate category of employees. The employer later decided to terminate one of the plans in order to obtain a reversion of surplus assets and

to establish a successor plan with the same benefits for the participants and beneficiaries of the terminated plan. The PBGC opined that the 1984 Guidelines did not apply to that situation, and the employer was not required to annuitize the benefits of the participants and beneficiaries of the ongoing plan. The PBGC did not suggest, however, that the spin-off of the ongoing plan constituted a method of plan termination. Nor did the PBGC suggest that an employer could terminate any plan without following ordinary termination procedures, including the requirements for distributing plan assets and allocating them among plan participants and beneficiaries. And the letters certainly did not indicate that an employer has a fiduciary duty to consider a spin-off as an alternative to terminating a plan by purchasing annuities. See PBGC Op. Ltr. 85-11 (May 14, 1985) (Br. in Opp. App. 6a-9a); PBGC Op. Ltr. 85-21 (Aug. 26, 1985) (Br. in Opp. App. 10a-13a).

The third opinion letter involved "a transfer [of assets and liabilities] from a single-employer plan to an ongoing multiemployer plan *followed by* the termination of the single-employer plan." PBGC Op. Ltr. 85-25 (Oct. 11, 1985) (Br. in Opp. App. 15a) (emphasis added). The PBGC opined only that the situation was not covered by the 1984 Guidelines. The PBGC did not suggest that the transfer of assets and liabilities was itself a method of accomplishing the subsequent termination. Nor did the PBGC suggest that the termination could be accomplished without following the ordinary procedure of purchasing annuities or otherwise distributing the assets of the terminating plan to the participants and beneficiaries in accordance with statutory and regulatory requirements. Indeed, the PBGC cautioned that "if the transaction lacks a substantial business purpose and instead is intended as a means to recover surplus plan assets without satisfying the plan termination requirements of Title IV of ERISA, the PBGC will not recognize the termination under Title IV." *Ibid.* See *ibid.* (noting that the PBGC would not recognize the validity of the termination if there was an "intent to circum-

vent the termination requirements" by first transferring assets and liabilities out of the plan). Finally, the PBGC did not suggest that an employer has a fiduciary obligation to consider making a transfer of assets and liabilities before or in lieu of terminating a plan.[10]

C. Requiring An Employer To Consider Merger As A Means of Plan Termination Would Undermine The Purposes of ERISA

The court of appeals' holding is not only inconsistent with the well-established distinction between settlor and fiduciary functions, ERISA's text and structure, and the PBGC's regulations, but it is also contrary to the purposes of the Act.

1. One of ERISA's basic goals is to encourage the creation and funding of employee benefit plans. 29 U.S.C. 1001(a), 1001a(c), 1001b(c). The holding of the court of appeals, if affirmed, would have the opposite effect.

As discussed above, the freedom of employers to alter or terminate plans encourages them to create those plans, because it reassures employers that they have the flexibility to modify the plans for business reasons. See p. 13, *supra*. If employers had a fiduciary duty to consider merger as a means of terminating a plan, they would not be free to choose termination when it made business sense. Instead, in some circumstances, an employer would be forced to continue maintaining an ERISA plan even though continuing to do so was against its business interests. That prospect would likely discourage some employers from creating ERISA plans in the first instance.

In addition, a requirement to consider merger as a means of termination would mean that employers would, in some

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[10] Respondent also erroneously states that Opinion Letter 85-25 indicates that an employer may obtain a reversion following a merger. On the contrary, the letter emphasizes that "[a] valid plan termination is a prerequisite to a reversion of surplus plan assets to an employer." PBGC Op. Ltr. 85-25 (Oct. 11, 1985) (Br. in Opp. App. 15a). See p. 20, *supra*.

instances, be precluded from terminating over-funded plans to obtain a reversion of excess plan assets. Presumably, over-funded plans would be the most likely to attract an eager merger partner, whose offer the sponsor of the over-funded plan might have to consider as an alternative to terminating the plan and obtaining a reversion. The possibility that employers would not be able to obtain reversions would likely discourage them from adequately funding their plans. The authority to recover residual assets reassures employers that they will be able to recoup their money if the plans have more resources at termination than they need. That authority thus encourages adequate plan funding. See p. 13, *supra*. Depriving employers of that authority, in contrast, would deprive them of the assurance that they could recoup any over-funding, and therefore would create an incentive for them to minimize the amount that they contribute to their plans. See *Hawkeye Nat'l Life Ins. Co.* v. *Avis Indus. Corp.*, 122 F.3d 490, 502 n.7 (8th Cir. 1997); *Chait* v. *Bernstein*, 835 F.2d 1017, 1027 (3d Cir. 1988).

2. Another important goal of ERISA is to increase the likelihood that participants and beneficiaries of single-employer defined benefit plans will receive their full benefits. 29 U.S.C. 1001, 1001b(c). That goal too would be frustrated by the rule adopted by the court of appeals.

The purchase of annuity contracts from a financially sound insurance company ensures that plan participants and beneficiaries will receive their full benefits. That is particularly true because, under the DOL's interpretation of the Act, fiduciaries of a terminating defined benefit pension plan who purchase annuity contracts generally have a fiduciary duty to take steps calculated to obtain the safest annuities available. 29 C.F.R. 2509.95-1(c).

In the view of the DOL and the PBGC, when a plan is merged rather than terminated by the purchase of annuities, participants and beneficiaries face a greater risk that they will not receive their full benefits. The merger provides them

only a promise of future benefits under the merged plan, the payment of which is contingent on the continued health of that plan. The added risk to participants and beneficiaries is particularly great in the type of merger proposed by respondent PACE—merger of a single-employer plan into a multiemployer plan. Although the PBGC continues to guarantee benefits under the multiemployer plan, the PBGC's guarantee is substantially less than under the single-employer plan. Compare 29 U.S.C. 1322 with 29 U.S.C. 1322a.[11]

3. Finally, imposing a fiduciary duty on employers to consider merger as a means of terminating their plans would undermine ERISA's goal of ensuring a financially sound termination insurance system. See 29 U.S.C. 1001(c), 1001a(c), 1001b(a) and (c). Some plans that would have been terminated and satisfied their full benefit liabilities by the purchase of annuities or otherwise would instead be required to merge with other plans. As a result, the PBGC would have to continue to insure those plans, and the insurance program would remain exposed to potential liability.

There has been some improvement in the PBGC's financial condition in the past two years, but existing plans continue to be massively underfunded, and the PBGC's future exposure to losses from financially troubled sponsors remains high. See PBGC, *Annual Management Report, Fiscal Year 2006*, at 3-5, 14-16 (Nov. 15, 2006) <http://www.pbgc.gov/docs/PBGCAMR.pdf> (PBGC Report). Despite attempts to address underfunding problems with new funding rules in the Pension Protection Act of 2006, Pub. L. No. 109-280, Tits. I, II, 120 Stat. 784, 858; PBGC Report 8, the PBGC is not in a

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[11] For example, under a single-employer plan terminating in 2007, the maximum guarantee for a straight-life annuity at age 65 is $49,500 annually. See http://www.pbgc.gov/workers-retirees/find-your-pension-plan/content/page789.html. By contrast, for a worker with 30 years of service under a multiemployer plan, the maximum annual benefit guarantee is $12,870. PBGC, *Annual Management Report, Fiscal Year 2006*, at 12-13 (Nov. 15, 2006) <http://www.pbgc.gov/docs/PBGCAMR.pdf>.

position unnecessarily to assume responsibility for more underfunded plans.[12]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[12] The single-employer insurance program has a deficit of more than $18.1 billion, and the PBGC estimates a reasonably possible exposure to $73 billion in underfunding. PBGC Report 4-5, 14-15. The total underfunding in all single-employer plans is estimated to be $350 billion. *Id.* at 15. The PBGC's separate multiemployer plan insurance program has a deficit of $739 million, and $83 million in reasonably possible liability. *Id.* at 5, 14, 16. The total underfunding in multiemployer plans is estimated to be more than $150 billion. *Id.* at 15.

STATUTORY APPENDIX

1. Section 1001 of Title 29, United States Code, provides:

Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administra ion of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum stan-

dards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of

service, to meet minimum standards of funding, and by requiring plan termination insurance.

* * * * *

2. Section 1001a of Title 29, United States Code provides, in pertinent part:

Additional Congressional findings and declaration of policy

* * * * *

(c) Policy

It is hereby declared to be the policy of this Act—

(1) to foster and facilitate interstate commerce,

(2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans,

(3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and

(4) to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans.

* * * * *

3. Section 1001b of Title 29, United States Code provides, in pertinent part:

Findings and declaration of policy

(a) Findings

The Congress finds that—

(1) single-employer defined benefit pension plans have a substantial impact on interstate commerce and are affected with a national interest;

(2) the continued well-being and retirement income security of millions of workers, retirees, and their dependents are directly affected by such plans;

(3) the existence of a sound termination insurance system is fundamental to the retirement income security of participants and beneficiaries of such plans; and

(4) the current termination insurance system in some instances encourages employers to terminate pension plans, evade their obligations to pay benefits, and shift unfunded pension liabilities onto the termination insurance system and the other premium-payers.

* * * * *

(c) Declaration of policy

It is hereby declared to be the policy of this title—

(1) to foster and facilitate interstate commerce;

(2) to encourage the maintenance and growth of single-employer defined benefit pension plans;

(3) to increase the likelihood that participants and beneficiaries under single-employer defined benefit pension plans will receive their full benefits;

(4) to provide for the transfer of unfunded pension liabilities onto the single-employer pension plan termination insurance system only in cases of severe hardship;

(5) to maintain the premium costs of such system at a reasonable level; and

(6) to assure the prudent financing of current funding deficiencies and future obligations of the single-

employer pension plan termination insurance system by increasing termination insurance premiums.

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4. Section 1002 of Title 29, United States Code provides, in pertinent part:

Definitions

* * * * *

(16)(A) The term "administrator" means—

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

* * * * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any

authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

* * * * *

5. Section 1058 of Title 29, United States Code provides:

Mergers and consolidations of plans or transfers of plan assets

A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). The preceding sentence shall not apply to any transaction to the extent that participants either before or after the transaction are covered under a multiemployer plan to which subchapter III of this chapter applies.

6. Section 1104 of Title 29, United States Code provides, in pertinent part:

Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

* * * * *

7. Section 1341 of Title 29, United States Code, provides, in pertinent part:

Termination of single-employer plans

(a) General rules governing single-employer plan terminations

(1) Exclusive means of plan termination

Except in the case of a termination for which proceedings are otherwise instituted by the corporation as provided in section 1342 of this title, a single-employer plan may be terminated only in a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section.

(2) 60-day notice of intent to terminate

Not less than 60 days before the proposed termination date of a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section, the plan administrator shall provide to each affected party (other than the corporation in the case of a standard termination) a written notice of intent to terminate stating that such termination is intended and the proposed termination date. The written notice shall include any related additional information required in regulations of the corporation.

(3) Adherence to collective bargaining agreements

The corporation shall not proceed with a termination of a plan under this section if the termination would violate the terms and conditions of an existing collective bargaining agreement. Nothing in the preceding sentence shall be construed as limiting the authority of the corporation to institute proceedings to involuntarily terminate a plan under section 1342 of this title.

(b) Standard termination of single-employer plans

(1) General requirements

A single-employer plan may terminate under a standard termination only if—

(A) the plan administrator provides the 60-day advance notice of intent to terminate to affected parties required under subsection (a)(2) of this section,

(B) the requirements of subparagraphs (A) and (B) of paragraph (2) are met,

(C) the corporation does not issue a notice of non compliance under subparagraph (C) of paragraph (2), and

(D) when the final distribution of assets occurs, the plan is sufficient for benefit liabilities (determined as of the termination date).

(2) Termination procedure

(A) Notice to the corporation

As soon as practicable after the date on which the notice of intent to terminate is provided pursuant to subsection (a)(2) of this section, the plan administrator shall send a notice to the corporation setting forth—

(i) certification by an enrolled actuary—

(I) of the projected amount of the assets of the plan (as of a proposed date of final distribution of assets),

(II) of the actuarial present value (as of such date) of the benefit liabilities (determined as of the proposed termination date) under the plan, and

(III) that the plan is projected to be sufficient (as of such proposed date of final distribution) for such benefit liabilities,

(ii) such information as the corporation may prescribe in regulations as necessary to enable the corporation to make determinations under subparagraph (C), and

(iii) certification by the plan administrator that—

(I) the information on which the enrolled actuary based the certification under clause (i) is accurate and complete, and

(II) the information provided to the corporation under clause (ii) is accurate and complete.

Clause (i) and clause (iii)(I) shall not apply to a plan described in section 412(i) of title 26.

(B) Notice to participants and beneficiaries of benefit commitments[1]

No later than the date on which a notice is sent by the plan administrator under subparagraph (A), the plan administrator shall send a notice to each person who is a participant or beneficiary under the plan—

(i) specifying the amount of the benefit liabilities (if any) attributable to such person as of the proposed termination date and the benefit form on the basis of which such amount is determined, and

(ii) including the following information used in determining such benefit liabilities:

(I) the length of service,

(II) the age of the participant or beneficiary,

(III) wages,

(IV) the assumptions, including the interest rate, and

(V) such other information as the corporation may require.

Such notice shall be written in such manner as is likely to be understood by the participant or beneficiary and as may be prescribed in regulations of the corporation.

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[1] So in original. Probably should be "benefit liabilities".

(C) Notice from the corporation of noncompliance

(i) In general

Within 60 days after receipt of the notice under subparagraph (A), the corporation shall issue a notice of noncompliance to the plan administrator if—

(I) it determines, based on the notice sent under paragraph (2)(A) of subsection (b) of this section, that there is reason to believe that the plan is not sufficient for benefit liabilities,

(II) it otherwise determines, on the basis of information provided by affected parties or otherwise obtained by the corporation, that there is reason to believe that the plan is not sufficient for benefit liabilities, or

(III) it determines that any other requirement of subparagraph (A) or (B) of this paragraph or of subsection (a)(2) of this section has not been met, unless it further determines that the issuance of such notice would be inconsistent with the interests of participants and beneficiaries.

(ii) Extension

The corporation and the plan administrator may agree to extend the 60-day period referred to in clause (i) by a written agreement signed by the corporation and the plan administrator before the expiration of the 60-day period. The 60-day period shall be extended as provided in the agreement and may be further extended by subsequent written agreements signed by the corporation and the plan administrator made before the expiration of a previously agreed upon extension of the 60-day period. Any extension may be made upon such terms and conditions (including the payment of benefits)

as are agreed upon by the corporation and the plan administrator.

(D) Final distribution of assets in absence of notice of noncompliance

The plan administrator shall commence the final distribution of assets pursuant to the standard termination of the plan as soon as practicable after the expiration of the 60-day (or extended) period referred to in subparagraph (C), but such final distribution may occur only if—

(i) the plan administrator has not received during such period a notice of noncompliance from the corporation under subparagraph (C), and

(ii) when such final distribution occurs, the plan is sufficient for benefit liabilities (determined as of the termination date).

(3) Methods of final distribution of assets

(A) In general

In connection with any final distribution of assets pursuant to the standard termination of the plan under this subsection, the plan administrator shall distribute the assets in accordance with section 1344 of this title. In distributing such assets, the plan administrator shall—

(i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or

(ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan. A transfer of assets to the corporation in accordance with section 1350 of this title on behalf of a missing participant shall satisfy this subparagraph with respect to such participant.

(B) Certification to the corporation of final distribution of assets

Within 30 days after the final distribution of assets is completed pursuant to the standard termination of the plan under this subsection, the plan administrator shall send a notice to the corporation certifying that the assets of the plan have been distributed in accordance with the provisions of subparagraph (A) so as to pay all benefit liabilities under the plan.

* * * * *

8. Section 1343 of Title 29, United States Code, provides, in pertinent part:

Reportable events

(a) Notification that event has occurred

Within 30 days after the plan administrator or the contributing sponsor knows or has reason to know that a reportable event described in subsection (c) of this section has occurred, he shall notify the corporation that such event has occurred, unless a notice otherwise required under this subsection has already been provided with respect to such event. The corporation is authorized to waive the requirement of the preceding sentence with respect to any or all reportable events with respect to any plan, and to require the notification to be made by including the event in the annual report made by the plan.

* * * * *

(c) Enumeration of reportable events

For purposes of this section a reportable event occurs—

* * * * *

(8) when a plan merges, consolidates, or transfers its assets under section 1058 of this title, or when an alternative method of compliance is prescribed by the Secretary of Labor under section 1030 of this title;

* * * * *

9. Section 1344 of Title 29, United States Code, provides, in pertinent part:

Allocation of assets

(a) Order of priority of participants and beneficiaries

In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

(1) First, to that portion of each individual's accrued benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.

(2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.

(3) Third, in the case of benefits payable as an annuity—

(A) in the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the 3-year period ending on the termination date of the plan, to each such benefit, based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least,

(B) in the case of a participant's or beneficiary's benefit (other than a benefit described in subparagraph (A)) which would have been in pay status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, to each such benefit based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least.

For purposes of subparagraph (A), the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period.

(4) Fourth—

(A) to all other benefits (if any) of individuals under the plan guaranteed under this subchapter (determined without regard to section 1322b(a) of this title), and

(B) to the additional benefits (if any) which would be determined under subparagraph (A) if section 1322(b)(5) of this title did not apply.

For purposes of this paragraph, section 1321 of this title shall be applied without regard to subsection (c) thereof.

(5) Fifth, to all other nonforfeitable benefits under the plan.

(6) Sixth, to all other benefits under the plan.

* * * * *

(d) Distribution of residual assets; restrictions on reversions pursuant to recently amended plans; assets attributable to employee contributions; calculation of remaining assets

(1) Subject to paragraph (3), any residual assets of a single-employer plan may be distributed to the employer if—

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

* * * * *

(3) (A) Before any distribution from a plan pursuant to paragraph (1), if any assets of the plan attributable to employee contributions remain after satisfaction of all liabilities described in subsection (a) of this section, such remaining assets shall be equitably distributed to the participants who made such contributions or their beneficiaries (including alternate payees, within the meaning of section 1056(d)(3)(K) of this title).

(B) For purposes of subparagraph (A), the portion of the remaining assets which are attributable to employee contributions shall be an amount equal to the product derived by multiplying—

(i) the market value of the total remaining assets, by

(ii) a fraction—

(I) the numerator of which is the present value of all portions of the accrued benefits with respect to participants which are derived from participants'

mandatory contributions (referred to in subsection (a)(2) of this section), and

(II) the denominator of which is the present value of all benefits with respect to which assets are allocated under paragraphs (2) through (6) of subsection (a) of this section.

(C) For purposes of this paragraph, each person who is, as of the termination date—

(i) a participant under the plan, or

(ii) an individual who has received, during the 3-year period ending with the termination date, a distribution from the plan of such individual's entire nonforfeitable benefit in the form of a single sum distribution in accordance with section 1053(e) of this title or in the form of irrevocable commitments purchased by the plan from an insurer to provide such nonforfeitable benefit,

shall be treated as a participant with respect to the termination, if all or part of the nonforfeitable benefit with respect to such person is or was attributable to participants' mandatory contributions (referred to in subsection (a)(2) of this section).

* * * * *

10. Section 1350 of Title 29, United States Code, provides, in pertinent part:

Missing participants

(a) General rule

(1) Payment to the corporation

A plan administrator satisfies section 1341 (b)(3)(A) of this title in the case of a missing participant only if the plan administrator—

(A) transfers the participant's designated benefit to the corporation or purchases an irrevocable commitment from an insurer in accordance with clause (i) of section 1341(b)(3)(A) of this title, and

(B) provides the corporation such information and certifications with respect to such designated benefits or irrevocable commitments as the corporation shall specify.

(2) Treatment of transferred assets

A transfer to the corporation under this section shall be treated as a transfer of assets from a terminated plan to the corporation as trustee, and shall be held with assets of terminated plans for which the corporation is trustee under section 1342 of this title, subject to the rules set forth in that section.

* * * * *

(b) Definitions

For purposes of this section—

(1) Missing participant

The term "missing participant" means a participant or beneficiary under a terminating plan whom the plan administrator cannot locate after a diligent search.

* * * * *

11. Section 1411 of Title 29, United States Code, provides, in pertinent part:

Mergers and transfers between multiemployer plans

(a) Authority of plan sponsor

Unless otherwise provided in regulations prescribed by the corporation, a plan sponsor may not cause a multiemployer plan to merge with one or more multiemployer plans, or engage in a transfer of assets and liabilities to or from another multiemployer plan, unless such merger or transfer satisfies the requirements of subsection (b) of this section.

(b) Criteria

A merger or transfer satisfies the requirements of this section if—

(1) in accordance with regulations of the corporation, the plan sponsor of a multiemployer plan notifies the corporation of a merger with or transfer of plan assets or liabilities to another multiemployer plan at least 120 days before the effective date of the merger or transfer;

(2) no participant's or beneficiary's accrued benefit will be lower immediately after the effective date of the merger or transfer than the benefit immediately before that date;

(3) the benefits of participants and beneficiaries are not reasonably expected to be subject to suspension under section 1426 of this title; and

(4) an actuarial valuation of the assets and liabilities of each of the affected plans has been performed during the plan year preceding the effective date of the merger or transfer, based upon the most recent data available as

of the day before the start of that plan year, or other valuation of such assets and liabilities performed under such standards and procedures as the corporation may prescribe by regulation.

* * * * *

12. Section 1412 of Title 29, United States Code, provide, in pertinent part:

Transfers between a multiemployer plan and a single-employer plan

(a) General authority

A transfer of assets or liabilities between, or a merger of, a multiemployer plan and a single-employer plan shall satisfy the requirements of this section.

(b) Accrued benefit of participant or beneficiary not lower immediately after effective date of transfer or merger

No accrued benefit of a participant or beneficiary may be lower immediately after the effective date of a transfer or merger described in subsection (a) of this section than the benefit immediately before that date.

* * * * *

REGULATORY APPENDIX

1. Section 1.414(*l*)-1 of Title 26, Code of Federal Regulations, provides in pertinent part:

Mergers and consolidations of plans or transfers of plan assets.

* * * * *

(b) *Definitions.* For purposes of this section:

(1) Single plan. A plan is a "single plan" if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries. For purposes of the preceding sentence, all the assets of a plan will not fail to be available to provide all the benefits of a plan merely because the plan is funded in part or in whole with allocated insurance instruments. A plan will not fail to be a single plan merely because of the following:

(i) The plan has several distinct benefit structures which apply either to the same or different participants,

(ii) The plan has several plan documents,

(iii) Several employers, whether or not affiliated, contribute to the plan,

(iv) The assets of the plan are invested in several trusts or annuity contracts, or

(v) Separate accounting is maintained for purposes of cost allocation but not for purposes of providing benefits under the plan.

However, more than one plan will exist if a portion of the plan assets is not available to pay some of the benefits. This will be so even if each plan has the same benefit structure or plan documents, or if all or part of the assets are invested in one trust with separate accounting with respect to each plan.

(2) *Merger or consolidation.* The terms "merger" or "consolidation" means the combining of two or more plans into a single plan. A merger or consolidation will not occur merely because one or more corporations undergo a reorganization (whether or not taxable). Furthermore, a merger or consolidation will not occur if two plans are not combined into a single plan, such as by using one trust which limits the availability of assets of one plan to provide benefits to participants and beneficiaries of only that plan.

* * * * *

2. Section 2509.75-8 of Title 29, Code of Federal Regulations, provides in pertinent part:

Questions and answers relating to fiduciary responsibility under the Employee Retirement Income Security Act of 1974.

The Department of Labor today issued questions and answers relating to certain aspects of fiduciary responsibility under the Act, thereby supplementing ERISA IB 75-5 (29 CFR 2555.75-5) which was issued on June 24, 1975, and published in the Federal Register on July 28, 1975 (40 FR 31598).

Pending the issuance of regulations or other guidelines, persons may rely on the answers to these questions in order to resolve the issues that are specifically considered. No inferences should be drawn regarding issues not raised which may be suggested by a particular question and answer or as to why certain questions, and not others, are included. Furthermore, in applying the questions and answers, the effect of subsequent legislation, regulations, court decisions, and interpretive bulletins must be considered. To the extent that plans utilize or rely on these answers and the requirements of regulations subsequently adopted vary from the answers relied on, such plans may have to be amended.

* * * * *

D-3 Q: Does a person automatically become a fiduciary with respect to a plan by reason of holding certain positions in the administration of such plan?

A: Some offices or positions of an employee benefit plan by their very nature require persons who hold them to perform one or more of the functions described in section 3(21)(A) of the Act. For example, a plan administrator or a trustee of a plan must, by the very nature of his position, have "discretionary authority or discretionary responsibility in the administration" of the plan within the meaning of section 3(21)(A)(iii) of the Act. Persons who hold such positions will therefore be fiduciaries. Other offices and positions should be examined to determine whether they involve the performance of any of the functions described in section 3(21)(A) of the Act. For example, a plan might designate as a "benefit supervisor" a plan employee whose sole function is to calculate the amount of benefits to which each plan participant is entitled in accordance with a mathematical formula contained in the written instrument pursuant to which the plan is maintained. The benefit supervisor, after calculating the benefits, would then inform the plan administrator of the results of his calculations, and the plan administrator would authorize the payment of benefits to a particular plan participant. The benefit supervisor does not perform any of the functions described in section 3(21)(A) of the Act and is not, therefore, a plan fiduciary. However, the plan might designate as a "benefit supervisor" a plan employee who has the final authority to authorize or disallow benefit payments in cases where a dispute exists as to the interpretation of plan provisions relating to eligibility for benefits. Under these circumstances, the benefit supervisor would be a fiduciary within the meaning of section 3(21)(A) of the Act.

The Internal Revenue Service notes that it would reach the same answer to this question under section 4975(e)(3) of the Internal Revenue Code of 1954.

* * * * *

3. Section 2509.95-1 of Title 29, Code of Federal Regulations, provides:

Interpretive bulletin relating to the fiduciary standard under ERISA when selecting an annuity provider.

(a) Scope. This Interpretive Bulletin provides guidance concerning certain fiduciary standards under part 4 of title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1104-1114, applicable to the selection of annuity providers for the purpose of pension plan benefit distributions where the plan intends to transfer liability for benefits to the annuity provider.

(b) In General. Generally, when a pension plan purchases an annuity from an insurer as a distribution of benefits, it is intended that the plan's liability for such benefits is transferred to the annuity provider. The Department's regulation defining the term "participant covered under the plan" for certain purposes under title I of ERISA recognizes that such a transfer occurs when the annuity is issued by an insurance company licensed to do business in a State. 29 CFR 2510.3-3(d)(2)(ii). Although the regulation does not define the term "participant"' or "beneficiary" for purposes of standing to bring an action under ERISA Sec. 502(a), 29 U.S.C. 1132(a), it makes clear that the purpose of a benefit distribution annuity is to transfer the plan's liability with respect to the individual's benefits to the annuity provider.

Pursuant to ERISA section 404(a)(1), 29 U.S.C. 1104(a)(1), fiduciaries must discharge their duties with respect to the plan solely in the interest of the participants and beneficiaries. Section 404(a)(1)(A), 29 U.S.C. 1104(a)(1)(A), states

that the fiduciary must act for the exclusive purpose of providing benefits to the participants and beneficiaries and defraying reasonable plan administration expenses. In addition, section 404(a)(1)(B), 29 U.S.C. 1104(a)(1)(B), requires a fiduciary to act with the care, skill, prudence and diligence under the prevailing circumstances that a prudent person acting in a like capacity and familiar with such matters would use.

(c) Selection of Annuity Providers. The selection of an annuity provider for purposes of a pension benefit distribution, whether upon separation or retirement of a participant or upon the termination of a plan, is a fiduciary decision governed by the provisions of part 4 of title I of ERISA. In discharging their obligations under section 404(a)(1), 29 U.S.C. 1104(a)(1), to act solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to the participants and beneficiaries as well as defraying reasonable expenses of administering the plan, fiduciaries choosing an annuity provider for the purpose of making a benefit distribution must take steps calculated to obtain the safest annuity available, unless under the circumstances it would be in the interests of participants and beneficiaries to do otherwise. In addition, the fiduciary obligation of prudence, described at section 404(a)(1)(B), 29 U.S.C. 1104(a)(1)(B), requires, at a minimum, that plan fiduciaries conduct an objective, thorough and analytical search for the purpose of identifying and selecting providers from which to purchase annuities. In conducting such a search, a fiduciary must evaluate a number of factors relating to a potential annuity provider's claims paying ability and creditworthiness. Reliance solely on ratings provided by insurance rating services would not be sufficient to meet this requirement. In this regard, the types of factors a fiduciary should consider would include, among other things:

(1) The quality and diversification of the annuity provider's investment portfolio;

(2) The size of the insurer relative to the proposed contract;

(3) The level of the insurer's capital and surplus;

(4) The lines of business of the annuity provider and other indications of an insurer's exposure to liability;

(5) The structure of the annuity contract and guarantees supporting the annuities, such as the use of separate accounts;

(6) The availability of additional protection through state guaranty associations and the extent of their guarantees. Unless they possess the necessary expertise to evaluate such factors, fiduciaries would need to obtain the advice of a qualified, independent expert. A fiduciary may conclude, after conducting an appropriate search, that more than one annuity provider is able to offer the safest annuity available.

(d) Costs and Other Considerations. The Department recognizes that there are situations where it may be in the interest of the participants and beneficiaries to purchase other than the safest available annuity. Such situations may occur where the safest available annuity is only marginally safer, but disproportionately more expensive than competing annuities, and the participants and beneficiaries are likely to bear a significant portion of that increased cost. For example, where the participants in a terminating pension plan are likely to receive, in the form of increased benefits, a substantial share of the cost savings that would result from choosing a competing annuity, it may be in the interest of the participants to choose the competing annuity. It may also be in the interest of the participants and beneficiaries to choose a competing annuity of the annuity provider offering the safest available annuity is unable to demonstrate the ability to administer the payment of benefits to the participants and beneficiaries. The Department notes, however, that increased cost or other considerations could never justify putting the

benefits of annuitized participants and beneficiaries at risk by purchasing an unsafe annuity.

In contrast to the above, a fiduciary's decision to purchase more risky, lower-priced annuities in order to ensure or maximize a reversion of excess assets that will be paid solely to the employer-sponsor in connection with the termination of an over-funded pension plan would violate the fiduciary's duties under ERISA to act solely in the interest of the plan participants and beneficiaries. In such circumstances, the interests of those participants and beneficiaries who will receive annuities lies in receiving the safest annuity available and other participants and beneficiaries have no countervailing interests. The fiduciary in such circumstances must make diligent efforts to assure that the safest available annuity is purchased.

Similarly, a fiduciary may not purchase a riskier annuity solely because there are insufficient assets in a defined benefit plan to purchase a safer annuity. The fiduciary may have to condition the purchase of annuities on additional employer contributions sufficient to purchase the safest available annuity.

(e) Conflicts of Interest. Special care should be taken in reversion situations where fiduciaries selecting the annuity provider have an interest in the sponsoring employer which might affect their judgment and therefore create the potential for a violation of ERISA § 406(b)(1). As a practical matter, many fiduciaries have this conflict of interest and therefore will need to obtain and follow independent expert advice calculated to identify those insurers with the highest claims-paying ability willing to write the business.

4. Section 4001.2 of Title 29 Code of Federal Regulations, provides, in pertinent part:

Definitions.

For purposes of this chapter (unless otherwise indicated or required by the context):

* * * * *

Insurer means a company authorized to do business as an insurance carrier under the laws of a State or the District of Columbia.

Irrevocable commitment means an obligation by an insurer to pay benefits to a named participant or surviving beneficiary, if the obligation cannot be cancelled under the terms of the insurance contract (except for fraud or mistake) without the consent of the participant or beneficiary and is legally enforceable by the participant or beneficiary.

* * * * *

5. Section 4041.23 of Title 29, Code of Federal Regulations, provides, in pertinent part:

Notice of intent to terminate

* * * * *

(b) *Contents of notice.* The PBGC's standard termination forms and instructions package includes a model notice of intent to terminate. The notice of intent to terminate must include—

* * * * *

(9) *Extinguishment of guarantee.* A statement that after plan assets have been distributed in full satisfaction of all plan benefits under the plan with respect to a participant or a beneficiary of a deceased participant, either by the

purchase of irrevocable commitments (annuity contracts) or by an alternative form of distribution provided for under the plan, the PBGC no longer guarantees that participant's or beneficiary's plan benefits.

* * * * *

6. Section 4041.28 of Title 29, Code of Federal Regulations, provides, in pertinent part:

Closeout of plan

* * * * *

(c) *Method of distribution*—(1) *In general.* The plan administrator must, in accordance with all applicable requirements under the Code and ERISA, distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer or in another permitted form.

(2) *Lump sum calculations.* In the absence of evidence establishing that another date is the "annuity starting date" under the Code, the distribution date is the "annuity starting date" for purposes of—

(i) Calculating the present value of plan benefits that may be provided in a form other than by purchase of an irrevocable commitment from an insurer (e.g., in selecting the interest rate(s) to be used to value a lump sum distribution); and

(ii) Determining whether plan benefits will be paid in such other form.

(3) *Selection of insurer.* In the case of plan benefits that will be provided by purchase of an irrevocable commitment from an insurer, the plan administrator must select the insurer in accordance with the fiduciary standards of Title I of ERISA.

* * * * *

7. Section 4044.4 of Title 29, Code of Federal Regulations, provides, in pertinent part:

Violations

(a) *General.* A plan administrator violates ERISA if plan assets are allocated or distributed upon plan termination in a manner other than that prescribed in section 4044 of ERISA and this subpart, except as may be required to prevent disqualification of the plan under the Code and regulations thereunder.

* * * * *

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No. 05-1448

In The

Supreme Court of the United States

JEFFREY H. BECK,
Petitioner,
v.
PACE INTERNATIONAL UNION, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE ERISA INDUSTRY COMMITTEE, AND THE RETAIL INDUSTRY LEADERS ASSOCIATION IN SUPPORT OF THE PETITIONER

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Amici curiae respectfully submit this brief in support of Petitioner pursuant to Supreme Court Rule 37.3.[1] *Amici* urge the Court to reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF INTEREST

Amici, the Chamber of Commerce of the United States of America, The ERISA Industry Committee, and the Retail Industry Leaders Association, are trade associations that collectively represent thousands of employers.

The Chamber of Commerce of the United States of America (the "Chamber") is a nonprofit corporation that is the world's largest federation of business, trade and professional organizations in the United States. The Chamber represents over three million businesses and organizations of every size, in every sector, and in every region of the United States. An important function of the Chamber is to represent the interests of its members in the federal courts in cases addressing issues of widespread concern to the business community. The ability of its member organizations to provide and administer in a reasonable fashion employee benefits plans is of vital importance to the Chamber's member organizations.

The ERISA Industry Committee ("ERIC") is a nonprofit organization representing America's largest private employers in a broad variety of industries. All of ERIC's members provide benchmark benefits to tens of millions of active and

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amici curiae*, and their consent letters accompany this brief.

retired workers and their families through pension, health care, compensation, and other employee benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA") and other Federal laws. All of ERIC's members do business in more than one State, and many have employees in all fifty States.

The Retail Industry Leaders Association ("RILA") is the world's leading alliance of fastest-growing and innovative retailers and their product and service suppliers. RILA members represent more than $1.5 trillion in sales annually and operate more than 100,000 stores, manufacturing facilities and distribution centers nationwide. Its member retailers and suppliers have facilities in all 50 states, and they employ millions of Americans.

The Chamber, ERIC, and RILA limit their *amicus* participation to significant cases in which they believe their discussion of the issues will advance arguments that will not be presented by the parties or by other *amici*. They have joined together to file this brief in support of Petitioners' Brief on the Merits because the Ninth Circuit's decision in this case misconstrues ERISA and attempts to alter fundamentally ERISA's provisions governing pension plan terminations--to the detriment of employers and plan participants and beneficiaries.

If allowed to stand, the Ninth Circuit's decision would expose employers, whether in or out of bankruptcy, to fiduciary liability for business decisions regarding matters, such as the creation, modification, or termination of an employee benefit plan, that this Court has ruled repeatedly are not subject to ERISA's fiduciary standards. In addition, the Ninth Circuit's decision would undermine employers' reliance on the longstanding interpretation and administration of ERISA's plan termination provisions by the Pension Benefit Guaranty

Corporation ("PBGC"), and would weaken the insurance protection that the PBGC provides to employees who participate in PBGC-insured plans. Although the number of single-employer defined benefit pension plans in the United States has declined over the past two decades, over 28,000 such plans remain, covering approximately 34 million participants and beneficiaries. Pension Benefit Guaranty Corporation, 2006 Annual Management Report, http://www.pbgc.gov/docs/PBGCAMR.pdf, at 9. As a result, the harm that the Ninth Circuit's decision in this case would inflict if its decision is upheld is of major consequence to a great many employers, plan participants, and beneficiaries.

STATEMENT OF THE CASE

Crown Vantage and Crown Paper, operators of paper mills, filed for bankruptcy. Many of their 2,600 workers were represented by the PACE International Union. Members of Crown's board of directors served as trustees of the company's pension plans. The bankruptcy court viewed the continued existence of the pension plans as a stumbling block to confirmation of the bankruptcy reorganization plan.

Crown investigated the possibility of effecting a "standard termination" of the plans, whereby the benefits would be fully annuitized. The union proposed that the plans be merged into the PACE multiemployer pension fund. Crown's Board reviewed the annuity bids and terminated the plans through the purchase of an annuity from the Hartford. Therefore, the Board did not accept the alternate proposal to merge the plans.

The bankruptcy court ruled that, although termination of pension plans is a business decision not subject to ERISA's fiduciary duties, discretionary actions taken to implement that decision carry a fiduciary responsibility. The bankruptcy court concluded that merger with an ongoing plan is a method

of terminating plans and therefore a decision concerning merger is subject to ERISA's fiduciary obligations. The bankruptcy court then ruled that Crown violated its fiduciary duties to the plan participants because Crown did not make an intensive and scrupulous investigation of the possible merger. The Ninth Circuit affirmed on both grounds, finding that plan merger is a form of termination and that the implementation of the decision to terminate the plan is subject to ERISA's fiduciary obligations. *Beck v. PACE Int'l Union*, 427 F.3d 668 (9th Cir. 2005).

SUMMARY OF ARGUMENT

The provision of ERISA at issue here, 29 U.S.C. § 1341(b)(3)(A), deals with the "final distribution of assets" when a defined benefit pension plan undergoes a "standard termination" governed by Section 1341(b). If a single-employer pension plan is terminated in a standard termination, ERISA requires the plan's assets to be distributed to provide the benefits that the terminating plan's participants and beneficiaries are entitled to under that plan, not merged into an ongoing multiemployer pension plan where the assets of the terminating plan can be used to pay benefits that have been or will be earned by participants in the multiemployer plan. The "final distribution of assets" provision states the methods whereby the plan administrator is to distribute plan assets to satisfy the requirement to "provide all benefit liabilities under the plan."

The PBGC's implementing regulations confirm that the final distribution of assets to provide "all benefit liabilities under the plan" in a standard termination under Section 1341 is accomplished in only one of two ways, either through the purchase of an irrevocable commitment from an insurer--an annuity contract--or, subject to limited exceptions not applicable here, through direct payments, such as lump sum

payments. Both of these forms of distribution of plan assets are inconsistent with the general merger of assets into a multiemployer plan that the Ninth Circuit erroneously believed was a permissible option in a standard termination.

The PBGC's regulations and regulatory interpretations have been consistent on this point since the current "final distribution of assets" provision was included in ERISA in 1987. PBGC then published a Notice of Revised Termination Rules summarizing the point that permeates the agency's standard termination implementing regulations and filing instructions, 53 Fed. Reg. 1904, 1905 (Jan. 22, 1988):

> Therefore, in order to terminate in a standard termination, a plan will have to [1] purchase irrevocable commitments that preserve all benefits and benefit forms in effect on the date of termination or [2] pay lump sum benefits that include the value (as of the distribution date) of all such benefits.

In addition, prior to the enactment of the current standard termination provisions in Section 1341, the PBGC consistently regulated standard terminations and their predecessors to require, except in limited circumstances, distribution of benefits through the purchase of irrevocable commitments from an insurer. Thus, under both previous and current regulations, the PBGC uniformly has required the distribution of plan assets in a standard termination to be in the form of an irrevocable commitment or through immediate payment or delivery of benefits. Merger into a multiemployer plan never has been a permissible means of distributing plan assets in a standard termination.

ARGUMENT

PBGC'S CONSISTENT REGULATORY TREATMENT OF DISTRIBUTION OF PLAN ASSETS IN A STANDARD TERMINATION CONFIRMS THAT THE MERGER OF A SINGLE-EMPLOYER PLAN INTO A MULTIEMPLOYER PLAN CANNOT BE A FORM OF STANDARD TERMINATION

The Ninth Circuit's decision that petitioner breached its fiduciary duty turns on whether a single employer pension plan can be terminated under ERISA by merging that plan into a multiemployer plan. In deciding that such a merger is an alternative method of plan termination, the court of appeals badly misconstrued ERISA.

Amici agree with petitioner that the Ninth Circuit's decision undermines the basic distinction between settlor and fiduciary functions that this Court has recognized repeatedly, starting in *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73 (1995). The decision to terminate or amend a plan is a settlor function, not a fiduciary function and therefore is not subject to ERISA's fiduciary standards. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999). This important principle requires reversal of the decision of the Ninth Circuit.

Equally important is the point that *amici* address in this brief: a plan merger is not a permissible method of terminating a defined benefit pension plan. If a plan cannot be terminated by merging it into another plan, then the employer in this case did not have the choice (between a merger and a termination) that, the Ninth Circuit mistakenly believed, required the application of ERISA's fiduciary standards. Petitioner's brief

addresses in detail how the language and structure of ERISA preclude merger into a multiemployer plan as a means of distribution in a standard termination. This brief focuses on how the PBGC's standard termination regulations and numerous regulatory pronouncements emphatically demonstrate the same point.

ERISA provides that the exclusive means for voluntarily terminating a single-employer defined benefit pension plan is the procedure set forth in 29 U.S.C. § 1341. Section 1341(b)(3)(A) provides that the final distribution of assets pursuant to a standard plan termination must be made "in accordance with section 1344." Section 1344 establishes a priority schedule for the allocation of plan assets among plan participants and beneficiaries.

Here the type of plan termination involved is a "standard termination," 29 U.S.C. § 1341(b). If a plan is terminated in a standard termination, ERISA requires the plan's assets to be distributed to provide the benefits that the terminating plan's participants and beneficiaries have earned under that plan, 29 U.S.C. § 1344(a), not merged into a multiemployer pension plan where the terminating plan's assets can be used to pay benefits that have been or will be earned by participants in the multiemployer plan. The "final distribution of assets" provision, 29 U.S.C. § 1341(b)(3)(A), identifies two methods that the plan administrator can use to distribute plan assets that have been allocated in accordance with Section 1344:

> (i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or
>
> (ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities

> under the plan. A transfer of assets to the corporation in accordance with section 1350 of this title on behalf of a missing participant shall satisfy this subparagraph with respect to such participant.

As is made clear by the PBGC's implementing regulations, the provision of "all benefit liabilities under the plan" in a standard termination is accomplished either through the purchase of an irrevocable commitment from an insurer--an annuity contract--or (subject to limited exceptions not applicable here) through direct payments, such as lump sum payments. The question centers on the reach of the statutory provision in 29 U.S.C. § 1341(b)(3)(A)(ii), which allows a plan administrator who does not purchase an annuity to "otherwise fully provide all benefit liabilities under the plan" "in accordance with the provisions of the plan and any applicable regulations." As shown below, merger into a multiemployer plan is not a method of satisfying this option in a standard termination.

Respondents have argued that the views of the PBGC in opposing mergers as a form of plan termination are views asserted for the first time in this litigation. To the contrary, those views reflect what the PBGC's implementing regulations, promulgated under the notice-and-comment procedures of the Administrative Procedure Act, have long required. The PBGC's regulations are entitled to great judicial deference. *Nachman Corp. v. PBGC*, 446 U.S. 359, 373-74 (1980); *see Boivin v. U.S. Airways, Inc.*, 446 F.3d 148, 154, 157 (D.C. Cir. 2006); *Bridgestone/Firestone, Inc. v. Pension Ben. Guar. Corp.*, 892 F.2d 105, 110 (D.C. Cir. 1989); *Blessitt v. Retirement Plan For Employees of Dixie Engine Co.*, 848 F.2d 1164, 1177 (11th Cir. 1988).

The language in 29 U.S.C. §1341(b)(3)(A) that is at issue in this case has been in effect since enactment of the Pension Protection Act of 1987, Subtitle D of Title IX of the Omnibus Budget Reconciliation Act of 1987, Pub.L.No. 100-203, §§ 9301-9346, 101 Stat. 1330 ("PPA"), which altered the rules governing standard terminations, primarily by increasing the benefits that are protected in a standard termination. Shortly after PPA was enacted, the PBGC made clear that the *only* alternative to purchasing an irrevocable commitment from an insurer is the payment of a lump sum amount that reflects the present value of the participant's benefits, not merging the plan into a multiemployer plan:

> The major change in the law with respect to standard terminations is the increase in plan benefits that must be *paid* in order for a plan to terminate in a standard termination. The prior rule that a plan be able to discharge all benefit commitments under the plan has been replaced by the requirement that a plan pay all "benefit liabilities" under the plan (in section 9313(a)). The term "benefit liabilities" is synonymous with pre-PPA termination liability and includes all fixed and contingent liabilities to plan participants and beneficiaries, including liability for benefits in effect on the date of termination that are not protected under section 411(d)(6) of the Internal Revenue Code of 1986 or section 204(g) of ERISA. (Conference Report on H.R. 3545, Budget Reconciliation Act of 1987, H.R. Rep. No. 100-495, 100th Cong., 1st Sess.) *Therefore, in order to terminate in a standard termination, a plan will have to purchase irrevocable commitments that preserve all benefits and benefit forms in effect on the date of termination or pay lump sum*

> *benefits that include the value (as of the distribution date) of all such benefits.*

53 Fed. Reg. 1904, 1905 (Jan. 22, 1988) (Notice of Revised Termination Rules) (emphasis added).

Section 1341 contains various deadlines for actions that a plan administrator must take when implementing a standard termination, starting with the initial notice to the PBGC and affected parties of the intent to terminate, 29 U.S.C. § 1341(a)(2), through the post-distribution certification, 29 U.S.C. § 1341(b)(3)(B). PBGC's implementing regulations define when a "distribution" occurs in a standard termination. The term "distribution date" is used in the PBGC's standard termination regulations for various purposes, including to set the time limit for the "notice of annuity information" that must be provided to "each affected party entitled to plan benefit other than an affected party whose plan benefits will be distributed in the form of a nonconsensual lump sum," *see* 29 C.F.R. §§ 4041.23(b)(5), .27(a), (c), (d)(1), as well as the time limit for filing the "post-distribution certification" with the PBGC, *see* 29 C.F.R. § 4041.29(a).

The PBGC's regulatory definition of "distribution date" does not allow a plan merger to be used to distribute benefits in a standard termination. Putting aside the special provision for "missing participants," the only distribution options are annuity purchases and immediate delivery of benefit payments, neither of which occurs in a plan merger, 29 C.F.R. § 4001.2 (emphasis added):

> Distribution date means:
> (1) Except as provided in paragraph (2) --
> (i) For benefits provided through the purchase of irrevocable commitments, the date on which

> the obligation to provide the benefits passes from the plan to the insurer; and
> (ii) For benefits provided other than through the purchase of irrevocable commitments, the date on which the *benefits are delivered to* the participant or beneficiary (or to another plan or benefit arrangement or other recipient authorized by the participant or beneficiary in accordance with applicable law and regulations) *personally or by deposit with a mail or courier service* (as evidenced by a postmark or written receipt); or
> (2) The deemed distribution date (as defined in § 4050.2) in the case of a designated benefit paid to the PBGC in accordance with part 4050 of this chapter (dealing with missing participants).

Moreover, the PBGC has issued "Standard Termination Filing Instructions" to implement its standard termination regulations. The pertinent language has been in effect since the version the PBGC issued shortly after it revised those regulations in 1997, 62 Fed. Reg. 60424 (Nov. 7, 1997). Those instructions, which are referenced throughout the standard termination regulations, reinforce the structure of a standard termination distribution as excluding the possibility of merging plan assets into another plan, http://www.pbgc.gov/docs/500_instructions.pdf, at 14:

> Except for Missing Participants (see section II.H.5), each participant must be offered all optional forms of benefits for which he or she is eligible under the terms of the plan. Plan benefits may be distributed in a form other than an annuity (*e.g.*, an immediate lump sum) only if the plan provides for such a distribution and

> (1) the participant elects the alternative form in writing, with the written consent of his or her spouse, or (2) for participants not already in pay status, the present value of the participant's benefit (valued in accordance with the rules described under "Valuation of Other Benefits" in the instructions to item 6 of Schedule EA-S), is at or below the plan's de minimis cashout level, which may not exceed $5,000.
>
> . . .
>
> If plan benefits are not payable in an optional form under the conditions described above, plan benefits must be distributed by the purchase from an insurer of an annuity contract that is an irrevocable commitment.

In the same vein, in its Small Business Guide (October 1998), the PBGC explained the standard termination process to the regulated small employer community. In the section on "[f]orm of distribution," PBGC stated as follows: "Unless you pay in a lump sum, you must distribute the plan assets in the form of a single-premium, nonsurrenderable annuity contract from an insurer."
http://www.pbgc.gov/docs/Small%20business%20guide.pdf, at 17.

The PBGC's post-PPA interpretation of the distribution rules as requiring either the purchase of an irrevocable commitment or the immediate distribution of lump-sum benefits, subject only to limited exceptions that leave no room for a merger into a multiemployer plan, is entirely consistent with its pre-PPA interpretations.

Shortly after ERISA was enacted, in a 1976 proposed rule, 41 Fed. Reg. 48504 (Nov. 3, 1976), and in a 1981 final rule, 46 Fed. Reg. 9532 (Jan. 28, 1981), the PBGC conducted a

rulemaking proceeding to address how it would determine whether a terminating plan was a "sufficient plan" (then requiring satisfaction only of all *guaranteed* benefits rather than, as now in a "standard termination," of all "benefit liabilities") and, if so, how such a plan could go about distributing its assets upon plan termination. At that time, the statute provided that the plan administrator, upon receipt of a "notice of sufficiency" from the PBGC, "may proceed with the termination of the plan in a manner consistent with [Title IV of ERISA]," 29 U.S.C. § 1341(a), and made no mention of the purchase of "irrevocable commitments" or of other means of distribution.

The PBGC decided in this rulemaking to require that a participant with a benefit payable as an annuity receive that benefit as an annuity under such a terminating "sufficient" plan, subject to specified exceptions only for certain *de minimis* benefits and for alternative forms (primarily consensual lump sums) that were (consistent with plan terms) *elected by the participant*. So as "[t]o ensure the timely and uninterrupted payment of benefits required to be provided in annuity form," the PBGC required that such annuity benefits be distributed through purchase of irrevocable commitments from an insurer (except in limited circumstances where the PBGC itself would provide certain early retirement benefits under a provision that is no longer in effect). This interpretation, like the PBGC's current interpretation, would preclude merger into a multiemployer plan as a permissible means of distribution.

In explaining why the plan administrator could not effect the distribution by simply paying an annuity from the plan's trust, the PBGC noted how such a structure could violate the allocation scheme in ERISA Section 4044, 29 U.S.C. § 1344. This explanation, too, illustrates why a plan merger is inconsistent with a standard termination, 46 Fed. Reg. at 9534:

> [T]he PBGC notes that continuation of the trust of a terminated plan could result in a violation of the allocation rules set forth in section 4044 of the Act. Those rules establish six categories of plan benefits and require that assets be allocated to benefits in the higher priority categories before the assests [sic] are allocated to benefits in lower priority categories. If a plan's trust were continued, older participants with benefits in priority category 5 that were funded on the allocation date might retire and begin receiving their benefits before all benefits in higher priority categories payable to younger participants has [sic] been paid. If the trust should then suffer losses, there might not be sufficient assets to pay the benefits in the higher priority categories. Thus, since the continuation of the trust of a terminated plan would not ensure payment of benefits in the manner required by section 4044 of the Act, the PBGC will not permit the annuity requirement to be satisfied by continuation of the trust.

Shortly after ERISA was amended by the Single-Employer Pension Plan Amendments Act of 1986, Pub.L.No. 99-272, §§ 11001-11019, 100 Stat. 237 ("SEPPAA") to create the concept of a "standard termination" (which required satisfaction of all "benefit commitments"), PBGC stated its interpretation that "SEPPAA . . . did not alter . . . . the rules relating to the distribution by the plan administrator of benefits payable under a terminated single-employer plan," and that, "[a]lthough much of the PBGC's sufficiency regulation is inapplicable to the new procedures, the rules therein continue to govern the final distribution of assets in a plan terminating under . . . a standard termination . . . ." 51 Fed. Reg. 44798 (Dec. 12, 1986). And, as explained above, the PBGC's post-

PPA interpretation continued to preclude merger into a multiemployer plans as a permissible means of distribution. Clearly, the views expressed by the PBGC are not, as respondents claim, opinions stated for the first time in an *amicus* brief.

The foregoing statutory and regulatory provisions and regulatory and administrative history demonstrate that the Ninth Circuit plainly was in error in stating that "distribution" is "not expressly defined in either ERISA or in [PBGC's] implementing regulations." *Beck*, 427 F.3d at 676. The Ninth Circuit failed to look to the regulatory definition of "distribution date," which (except in the case of a missing participant) allows benefits to be paid only by purchasing irrevocable commitments from an insurer or by making payments "delivered...personally or by...mail or courier," or to the many other clear indications in the PBGC's regulations and statements that limit the means of distribution in a standard termination. Instead, the court of appeals relied on dictionary definitions of "distribute" to support its mistaken view that those definitions "do not support the exclusion of mergers into multiemployer plans as a means of termination." *Id.* The PBGC's rules, by contrast, limit what the Ninth Circuit called the "alternative means," *id.* at 675, in 29 U.S.C. § 1341(b)(3)(A)(ii) ("otherwise fully provide all benefit liabilities under the plan") to distributions to missing participants, which are not at issue here, and to other payments that are immediately "delivered." A merger into a multiemployer plan--which might significantly dilute the security previously provided to plan participants by the assets of the terminating plan--is not a permissible means of distributing benefits in a standard termination.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be reversed.

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Respectfully submitted,

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